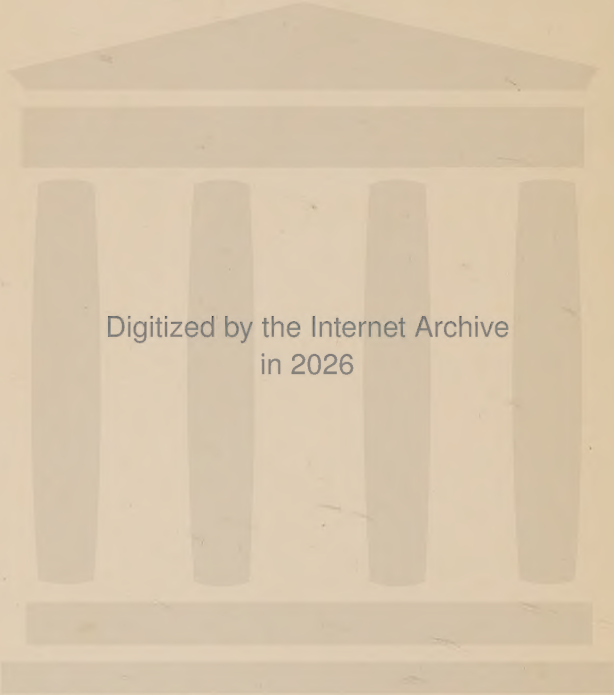


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THE DOCTOR IN COURT

THE DOCTOR IN COURT

By

EDWARD HUNTINGTON WILLIAMS, M.D.



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PREFACE

EVERY doctor is potentially an expert witness. It may not be of his own desire or seeking, usually quite the reverse. But whether he wishes it or not, sooner or later he will be haled into court to give testimony in connection with some case. It is one of the penalties of the profession.

Such testimony will be in the nature of medical opinion—expert testimony. And, much as the doctor may dread, or bitterly as he may resent it, there is no escape. Once the ubiquitous process-server has evaded the outposts and delivered his legally signed document, it becomes an ultimatum. The doctor must drop everything and appear in court. Also, he must answer all questions, whatever their character or insinuation, unless otherwise instructed by the judge.

It is an harassing, distressing experience, particularly to one not accustomed to such ordeals. Especially so to most physicians who, to their credit, have little personal contact with court rooms—are not familiar with the things that one should, or must, or may or may not do while seated in the presence of the Majesty of the Law.

P R E F A C E

The doctor thus summoned into court finds himself very much more handicapped than when acting in the field of his own profession. In puzzling medical problems, he may turn to his library and "read up," or consult with some confrère. But in this medico-legal field, the printed sources of information about court procedure in giving and taking of expert testimony, are few and not enlightening, and the doctor's friends usually as inexperienced as himself. And yet the physician on the witness stand is expected to measure up to expert standards.

It is the purpose of this book to throw some little light, at least, upon this vexed question. And to this end, following the physician's own precedent of elucidating medical subjects by giving "case histories," I have given instances in narrative form—actual occurrences in court rooms that have been brought to my personal attention from time to time during the last forty years. "Sugar coated" doses, if you please. But this again is good medical practice. Sugar-coating is the physician's own method of making his remedies more palatable, without impairing their potency. Indeed, certain kinds of coatings are absolutely essential to obtain the full effects of some important remedies.

The ordinary legally prepared book on foren-

P R E F A C E

sic, or medico-legal subjects, is certainly an uncoated dose. In delving into such works the physician seldom receives much witness-stand help. And the members of the legal profession assert a corresponding lack of information from such sources.

It is hoped that the anecdotes and incidents related in this volume, with the sugar-coating of narratives, may prove useful as well as interesting to court witnesses in general as well as to members of the medical and legal professions.

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CHAPTER I

TECHNICALITIES—AND MORE OF THEM

TECHNICALITIES are the life of trade—legal trade, at least. Which means that they may have nothing in common with the old term, justice. Indeed, Miss Justice is forever catching her toe in the meshes of these legal entanglements.

However, one should remember that the “blindfolded lady of the scales and saber” has a distinct penchant for punishment. She is very particular about carrying her punitive weapon where it can be used most effectively—in her strong right hand. The awkward left hand is plenty good enough for the clumsy process of scale-balancing.

But possibly Miss Justice’s penchant for punishment is due in a measure to her surroundings and the company she keeps. The general run of city police courts makes any one feel like keeping his eyes covered. Antiseptic nose pledgets, too, for the fastidious and unaccustomed. And, as for Miss Justice, she does well to keep her sword handy; she may need it for maidenly

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protection. For, whether we like it or not, in practical application at present, the term "law" is only theoretically synonymous with "justice."

"I'll have the law on you," means, "I'll have you punished," if I can, regardless of justice. Moreover, court officials, from His Honor down, usually seem to favor the prosecution—an attitude of prejudice against the man on trial. And yet in legal theory, this man is supposed to be so absolutely innocent that a mere doubt about the proof of his guilt makes it obligatory for the jury to find him guiltless.

That's the theory. In practice, the newspapers, voicing the attitude of the prosecution, often try and condemn the accused before the trial. Which makes it almost impossible to secure an intelligent jury. And yet, it is notorious that American juries fail to convict when the actual evidence is laid before them. Why? I suspect it is natural human reaction—an expression of resentment in many cases—resentment against a system that prates of justice, but so often fails to practice it.

Here is an example: A woman kills another woman, (the "hammer murderess" case)—is reported to have mangled her body. The part of the body mangled, as hinted by the press, makes

the crime trebly hideous. There is nothing extenuating—just a jealous, wretched female, who kills a charming, modest, blameless little lady acquaintance of the murderess' husband. That's all the juryman knows about the case from his newspaper reading. "Oh, yes," he admits, "he has read the newspapers some, but he is still open-minded." He is absolutely neutral—that is, so long as this she-devil is punished.

He doesn't *say* all this, of course, but mostly he thinks it—at least until the trial begins. Then he learns: (1) that the ogre of the mutilation (as he pictured her from the news reports) is a rather quiet, modest seeming little woman; (2) that the part of the body mutilated was the head and upper torso *only*, not the parts hinted at by the newspapers; (3) that the "blameless little lady" of the mutilation was a mistress of the ogre's husband, was ready to elope with him, and had twitted the about-to-be-deserted wife with this and other family troubles.

And then the reaction. The jury disagrees or brings in the mildest possible verdict, largely, I believe, because of the resentment its members feel at having been gulled and deceived by carefully inspired newspaper reports. You would do the same—possibly have done so. And so would any red-blooded descendant of the

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race of men who gave their blood to secure the simple, untechnical thing called "justice."

In the matter of jostling common sense out of place by wedging in legal technicalities, nothing excels that part of the law which denies the attending physician the right to testify about the mental health of his former patient in contested will cases. A layman might hold that such a physician was the very one to pass upon his patient's competency. But such an opinion is merely common sense, not law. Yet the nurse who attends the patient may give such testimony; the lawyer who calls to see the patient may do so; also the preacher, the cook, the casual visitor, and even the plumber who repaired the radiator in the room during those last-passing hours. But the doctor, the only person really qualified, and who has spent hours with the patient, and held long conversations in the course of his professional visits, is not legally qualified to express an opinion about his patient's mental health, should she have made a will, and should this will be contested.

Of course, there is the inevitable "exception": If the doctor signed his name as a witness to the will, he may then babble his opinion just the same as the lawyer, the cook, and the casual visitor. And from the jurors' viewpoint, at about the same legal value.

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Of course, a mere layman might suppose—commonsensibly speaking, I mean—that the value of the doctor's opinion would be about the same whether or not he had scribbled his signature. And so it is, of course, almost anywhere, except in court. But, legally speaking, the doctor must sign his name in order to pull himself up to the intellectual level of the lawyer, minister, cook, or plumber who happens to drop in. Otherwise, he remains a wallowing outcast in contested will cases.

Here is a true record of how it works: Katherine Helen Wickmore, a lingering victim of cancer of the liver, passed into the Great Beyond a few months ago. Her passing was tedious but, fortunately, comparatively painless and peaceful. Cancer of the liver, although invariably fatal, is comparatively painless. Yet it is often marked by mental clouding—the stupor produced by the ever present toxins. As a result, the victim sometimes lies for days in a half-stupor, attempting no voluntary conversation, answering questions in fragmentary, unfinished sentences. Frequently, the patient can only be roused momentarily, passing somnolently out of this life without any of those fictional momentary mental clearings that immediately precede dissolution.

Katherine Wickmore's case was one of these

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"fictitious" exceptions. At least such was the testimony of an interested relative in whose favor the will was drawn, and the attorney who drew the will. Indeed, the interested attorney, and the even more interested relative, testified that on the occasion of making the will, Mrs. Wickmore had flashed miraculously back into full consciousness. Also conveniently, since the flash came at the very time when the relative had brought her lawyer as a visitor.

At that very time, unaided and unprompted, Mrs. Wickmore had given a full and detailed recital of the items of her varied property (all of which, fortunately, was known minutely to the interested relative) and of her own free will had dictated to the attorney the complicated and comprehensive document that appeared as a record in the suit that followed.

Now, it appears, even on the testimony of these interested witnesses, that this miraculous period of restored intelligence occurred between the visit of the doctor in the morning and a second visit about noontime. In the morning the doctor had found his patient stuporous; she was still stuporous three hours later. And the nurse asserted that there had been no change in the interval between visits. Yet the verbose, legally phrased document purporting to be Mrs. Wick-

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more's will, was alleged to have been dictated by her and signed with her signature, in the interim between the doctor's visits.

It proved a veritable legal Gibraltar to the Judge sitting in the case. Plain laymen suspected that the stuporous Mrs. Wickmore might have received more than passing assistance from her two morning visitors—might even suspect that possibly the document was prepared in advance, particularly so, since the nurse who was bobbing in and out of the room quite frequently, testified that, so far as she could observe, there was no change in Mrs. Wickmore's stuporous condition.

But of course this nurse knew nothing of law. And meanwhile it was legally "spread upon the record," by the lawyer and the beneficiary of the will, that Mrs. Wickmore had done and did do this physiologically impossible thing. Each had held up his hand and sworn to tell the truth, the whole truth, and nothing but the truth. Could anything be clearer?

The doctor who had attended Mrs. Wickmore and visited her two or three times every day, thought it could. He believed Mrs. Wickmore was too ill, physically and mentally, to carry out such a rôle. And, outside the courtroom at least, his opinion was convincing. Possibly it would

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have done so before the high tribunal, also, if technicalities had not prevented the medical man from expressing it.

"Did you visit Mrs. Wickmore in any capacity other than as her physician?" the judge asked this physician. And the doctor answered, honestly, in the negative. Evidently, he had not received proper legal "admonishment."

"And were you a witness to the will?" the judge continued. And again the doctor replied in the negative.

"Well, then," said His Honor, "you will not be permitted to testify. That is the law."

But now the attorney was on his feet. "If you please, Your Honor, I think the Doctor has inadvertently mis-stated the case. I believe I can prove to you by his own testimony that his visits to Mrs. Wickmore, and the subjects of his conversations there, were not confined to his professional field, and that therefore he is competent to testify. May I ask permission to submit a few questions to the Doctor?"

The judge assented, and the attorney proceeded: "And did you, Doctor, upon any occasion after entering the room of Mrs. Wickmore, express the usual social amenity of bidding her 'good morning'?"

The doctor remembered that he did. "And

did you at any time speak to your patient upon any subject whatever other than in direct connection with your professional visit—remark to her or engage her in conversation about the weather—suggest that it was a ‘nice day,’ or a ‘rainy day,’ or any other similar purely social conversation?”

The doctor remembered that he had done so.

“And were these questions in the line of your professional duties—did they, as a matter of fact, have anything whatever to do with your professional services to your patient, Mrs. Wickmore?”

The doctor denied any connection whatever between these remarks and his professional duties. “Therefore, I submit, Your Honor,” the lawyer persisted, “on the doctor’s own statements, that his visits were not entirely confined to his professional duties—partook of the nature of a social call; and that therefore he is entitled to testify in this case.”

Before the judge could express his opinion, however, the doctor himself pulled out the chestnuts.

“Now that I think of it,” he said, “I did call upon Mrs. Wickmore at one time and left her a bouquet from my garden. It was purely a social call.”

And now the way was all nicely cleared up for

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the doctor's testimony. The little handful of flowers had swept away the technicality. And apparently the case would have fairly romped home, had it not happened that another little legal technicality came slithering in. Another doctor made the slip, and he an "expert," at that.

Now, an "expert" in such cases, is a doctor who is legally permitted to pass upon alleged facts about the person he has never seen, in contrast to the regular attending physician who is not permitted to testify about things that he really knows. This expert testified that a person in the last stages of cancer with her system so overwhelmingly poisoned that she was stuporous most of the time, could not rouse sufficiently to dictate such a complicated document as this will. Guided by His Honor's intelligent questions, this doctor explained that the patient's stupor was caused by poisons (toxins) produced by the cancer. And, as the source of these toxins is constantly and increasingly active, without remission, there was little chance of change in the patient's condition of continuous downward progress. In his opinion, there would be no period of clear thinking, any more than one would expect to find patches of clear water in a stream contaminated with a continuous source of pollution.

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The cross-examining attorney sought to modify the statement. Wasn't it possible—just *possible*—that a person in this state might have moments of mental clarity? And the physician, aware that in this world very few things indeed are absolutely impossible, made the fatal admission that perhaps such a thing might happen. But he guarded his statement with the emphatic opinion that no such thing took place in this case.

In short, the doctor used the “scientific caution” which holds such an honorable position in medicine, but is an absolute outcast in law. In law, either a thing is or it isn't. And so, although from a scientific standpoint it was all but impossible that Mrs. Wickmore could have voluntarily made such a will; and from a common sense point of view there was every reason to believe that her relative and the conniving lawyer had created the will—even in the face of such evidence, it was necessary for the judge to decide flatly against science and common sense. He was forced to accept the will as valid, because this one witness admitted that it was possible for the woman to have done the things that ordinary intelligence dictated she did not do.

Such is the power of a legal technicality. It does not permit the use of scientific caution. And the expert must have this in mind in giving

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his testimony, tossing scientific caution to the winds and making his statements dogmatically exact. It is only by this method that he can assist in effecting justice which may be attained through technically met technicalities, and without too much regard for common sense facts.

CHAPTER II

BACK-FIRE QUERIES

THE far-sighted, veteran attorney, in cross-examining expert witnesses, looks well ahead to the possibilities of every question. Experts have specific knowledge about things of which he is ignorant. Wherefore, an innocent seeming, casual question may furnish the crafty witness with ammunition to produce a terrific explosion.

The inexperienced lawyer often trips on these obstacles. Particularly is this likely to occur in his examination of medical experts, and especially so when the expert under examination deftly shifts the burden of medical knowledge to the attorney himself.

The most aggravating way of accomplishing this is by compelling the attorney to define the meaning of his own questions. Thus, in the case of Robert Jacobs, where the sanity of the defendant was in question the defense attorney attempted to discredit as much as possible the testimony of the medical witness by showing that the examination of the patient had not been very

thorough. This of course merely for the benefit of the jury.

This first witness was a young physician thoroughly experienced in medicine, but a novice at the ordeal of cross-examination. Wherefore, the attorney was attempting to create the impression that there had been an element of carelessness in the examination of the patient.

"Did you examine the patient's reflexes?" the attorney inquired, conveying the impression by his attitude that this wholly inconsequential test was most important.

The doctor answered in the negative. Also, being a novice, he failed to bolster his reply by stating that such an examination was wholly unnecessary, as was his privilege. For, although the law requires that the witness must answer such a question by a simple "yes" or "no," it permits him to "qualify" his answer—that is, explain it to almost any length he wishes. The novice is usually not aware of this.

Thus, in this instance, the young doctor might have answered "No, I did not examine his reflexes, because it wasn't necessary." But by admitting that he had not done so, conveyed the impression that he might have been somewhat careless—precisely what the cross-examining attorney wished.

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However, in this particular instance, there was a disconcerting sequel. The attorney himself was a novice, and probably his easy triumph over the first physician made him over-confident. One may toy with a novice; but beware the veteran witness. Which was just what this attorney discovered, when he repeated his former question to the next physician.

"Did you examine his reflexes?" drew, not an answer, but a question: "Just what do you mean by reflexes?" the doctor inquired.

The lawyer's guard was up in a moment. "I am asking a question, not answering one," he parried.

"Yes, I understand that," the witness replied, "but your question is not entirely intelligible. I ask merely that I may answer correctly—so that I may be sure we are referring to the same thing. There are many different kinds, types, conditions, and degrees of reflexes in the human body. So that your question 'Did you test his reflexes?' is too comprehensive to be answered intelligently unless modified. Just which reflexes do you mean, and to what kind of tests do you refer?"

And so the attorney has landed himself in a hole. He didn't know a thing about reflexes, and the doctor did. True, as he said, he was not the witness, not under cross-examination. That

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is, legally speaking. But psychologically he has now become so in the eyes of the jury. It appears to them that this is a perfectly fair question, asked for a definite reason. On its face it is innocuous enough.

In point of fact, it is most a difficult one, requiring special knowledge. Even the average intelligent physician would bungle the answer unless he had refreshed his memory recently. And if the attorney attempts to answer or explain it, he will certainly mire in his own ignorance. If he doesn't, he places himself in a bad light with the jury. Thus, he pays the penalty of dabbling with a subject about which he knows little—attempting to play the other fellow's game.

An older or more adroit attorney would hardly have made this slip. Such an attorney is alive to the dangerous possibilities involved in even a casual reference to one of these obscure subjects when sparring with an alert, skillful witness. So he refuses to take the bait, if offered, or makes it impossible for the witness to offer it.

However, the dangers involved in a cross-question are often far less obvious than in this case. Some difficulties cannot possibly be visualized. Particularly is this true in a case where the expert witness creates the impression of the existence of something that may or may not be true.

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Illustrating this, in a certain suit for damages, the defense attorney had scored heavily on a medical witness—rattled him to the extent of making him very angry, which is almost always disastrous—over the question of “railway spine.”

Now, “railway spine,” a few years ago was the hobby of certain malingerers who were in the employ of railroads. The constant jolting of the train was alleged to produce a condition of the spine, particularly in railroad employees, which totally incapacitated the patient, and from which he seldom recovered—at least until a substantial settlement was obtained. The unfortunate part of the situation is that, although there were some authentic cases, there were many malingerers, and physicians were sometimes imposed upon. And it was this suggested gullibility of medical men, and the vulnerability of their opinions about diagnosis, that developed in the cross-examination in question.

In this connection the attorney had referred to railway spine and provoked an unexpected and damaging “rise” out of the witness. First, the witness lost part of his temper, which is harmful; then he lost it completely, which is disastrous. And of course, the attorney made the most of it.

Having hung this expert’s scalp on his belt so

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easily, the attorney turned confidently to attack the expert who followed this discomfited one.

"Now, Doctor," he began, "what about this 'railway spine?' What do you know about it?"

"To which form of railroad spine do you refer, may I ask?" the doctor parried, suavely.

The retort was a dangerous trap, recognized as such immediately by the attorney. He did not know that there was more than one form of railway spine. Yet the physician's question suggesting it, put him immediately on the defensive to show his knowledge or expose his ignorance. That was precisely as the physician intended. Either case would throw the situation into the doctor's own realm—medicine.

But this attorney was old and resourceful. "Oh, I refer to the *usual* form," he said, thus getting a respite.

"Oh, you mean the *usual* form," the Doctor repeated, implying by his inflection that this "usual" form had nothing whatever to do with the case. "I fail to see any connection between this case and the 'usual form' of railway spine. But if you wish . . . ?"

Needless to say the cross-examining attorney was now quite willing to let well enough alone and deftly switch his question into fields with which he was more familiar.

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But the thing rankled a little, and the next day, happening to meet the physician on the street—he was an old acquaintance—he stopped him:

“See here, Doctor,” he said, “I didn’t know there was more than one form of railway spine.”

“I didn’t either,” the Doctor grinned; “there isn’t. And it has now cost me the price of a meal to have the satisfaction of telling you so. Come over to the club and have lunch with me.”

TO QUIZ OR NOT TO QUIZ

The law is a serious thing, without humor or sense of humor. This does not apply at all times to legal representatives. They take the law seriously, even if not too respectfully at times. That is, when they are on the stage. In the wings they have a keen sense of legal absurdities.

The popular conception of an alienist, if we may judge the public by its newspaper educators, is a physician who finds that a man is insane if he is acting for the defense, but sane if he represents the prosecution. There are exceptions to this, of course, but these exceptions seldom get themselves into print, and are rarely heard of.

Few people, indeed, ever hear of the unrecorded cases passed upon by alienists for the benefit of the lawyer before he goes to trial to determine whether or not the client is actually insane. Or,

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to be more exact, to determine whether or not the client is insane enough so that the jury could be lured into saying so.

Most of the able criminal lawyers have alienist friends to whom they refer their cases of suspected insanity for examination, and in whose word they place their confidence. One of these lawyers, a short time ago, was retained by a queer sort of man who had committed a crime that was quite an unusual one, and whose actions indicated a mental unbalance.

"I think he is crazy, Doctor," the lawyer said to his alienist friend over the 'phone in referring to the case; "so I wish you would look him over."

The alienist examined the man in his office, found evidence that there was something wrong—that the man was probably insane in the medical sense, but so rational seeming that in all probability no jury would call him abnormal. So the doctor called up the attorney:

"I guess you're right in thinking this man insane," he said to the lawyer; "but I don't believe any jury can be persuaded to say so."

"Well, then, perhaps I'd better take a change of venue," the lawyer suggested.

"Why a change of venue, John?" the doctor inquired. "Don't you think you can get justice in this court?"

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"Yes, I do," the attorney explained, "that is just it. I'm afraid I *will*."

Cross-examination is optional. Usually it is advisable. But when the matter of expert testimony is involved, the cross-examination often hurts more than it helps. Indeed, it is conceded that all cross-examinations tend to make the original statements of the witness more emphatic—tend to make him more partisan. So that, unless there is a good chance of showing that the witness is either ignorant or dishonest, it would seem the part of wisdom not to cross-examine at all.

But this is where the "gamble" comes in, where good acting and a knowledge of human nature and psychology is a great asset. For it requires courage and mastercraftsmanship, indeed, after a witness has given damaging testimony, to refuse to cross-examine him, to dismiss the case with an indifferent wave of the hand and simple words: "No questions." Yet, in just the right circumstances, and with just the right inflection, this is sometimes most effective.

Now, if the attorney were permitted to tell the jury in words what he would like to imply, that the testimony of this witness is of no account, cross-examination would be superfluous. But he is not allowed, directly, even to suggest such a thing. Wherefore, the failure to cross-examine

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may back-fire disastrously: the jury may misconstrue, and the friends of the defendant feel that their lawyer is not earning his wages—is loafing on the job.

With all this in mind, the wise attorney, when cross-examining a dangerous witness, usually chooses the safe middle ground and asks innocuous questions that are not likely to result in catastrophes. Especially so, when the witness is a veteran at the game; for such a witness may twist a seemingly innocent question into an opening for a telling thrust.

A case in point occurred in the Clara Phillips (the "Hammer Murderess") case. The physician under cross-examination and the cross-examining attorney were old time allies and adversaries. Each held the other in very great respect, fully aware that the slightest misstep might start the fireworks.

With this in mind, but knowing that a failure to cross-examine would react badly upon the jury, the attorney began a harmless and inconsequential line of questioning simply for the psychological effect. It was really time-killing, the legal camouflage of consuming about the same amount of time in the cross-examination that had been consumed by the direct examination—measuring evidence by the clock, as it were.

BACK-FIRE QUERIES

It was a humdrum, listless process, although underlying the apparently languid attitude of the attorney and the indifference of the witness, there was really tense alertness. Neither of them intended to be caught napping.

It will be recalled that from the witness chair, Clara, the defendant, having told her story of the murder on a direct examination lasting several hours, was cross-examined for about six more consecutive hours by this keen prosecuting attorney. Yet, during the entire time, she made no slip or contradiction of any consequence whatsoever. It was such a remarkable exhibition, so extraordinary, indeed, that even some of the hard-boiled newshounds at the reporters' table showed symptoms of interest.

The flawless quality of Clara's direct and defensive testimony was reflected in the effect produced upon such experienced court observers as Alma Whitaker and Adela Rogers St. Johns, well-known for the quality and versatility of their literary work. Both these writers recognized the extraordinary and unusual quality of the defendant's testimony. This was unquestioned. But Miss Whitaker interpreted Clara's straightforward story as the cleverly planned tale of a keen-minded woman too shrewd to fall into traps or be caught in contradictions; while Mrs. St.

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Johns construed Clara's seemingly childish simplicity and straightforwardness as being genuine—the simple, childlike narration of truth. Indicating, at least, that it was a most remarkable performance, whatever the correct interpretation.

Now, in dawdling about, putting in the listless time of cross-examination of the physician witness referred to, the cross-examining attorney dropped a few indifferent questions about Clara's examination and cross-examination on the witness stand. They were colorless and harmless, and intended to be so.

"You were present during the cross-examination of the defendant, were you not, Doctor?" the attorney asked. The doctor replied in the affirmative.

"You listened to all of my questions and heard all her answers, I suppose, Doctor?" the attorney pursued.

And again the doctor gave his assent.

"Do you think she was telling the truth?" the attorney inquired. It was the opening for a boomerang.

"I do," the doctor assented, earnestly. "Because I do not believe, Sir, that any person could be cross-examined by a man like yourself for six consecutive hours and not be caught in a single

BACK-FIRE QUERIES

lie unless she were absolutely truthful. I don't think it would be possible, Sir."

The attorney's face reddened: he recognized the compliment—and the thrust. The doctor's statement, although complimentary to himself, emphasized the evidence of the accused woman's truthfulness. Which illustrates how dangerous even the most seemingly innocuous question may become on occasion.

But, after all, the unexpected is the life and spice of courtroom procedure. It breaks the droning monotony. And, judged by jury verdicts, these things are usually of little consequence. It is something like a game of marbles when the boys are not playing for "keeps"—it is fun for the players and the spectators, and nobody loses much of anything except time.

A somewhat different situation sometimes arises in cross-examinations, when the victim under fire suddenly digs out a piece of private information and uses it unexpectedly. Such an incident occurred during the trial of a case which involved the state of mind of an old millionaire, who had become somewhat addled. Naturally, the main points in question involved the old gentleman's monetary achievements. But also his mental peculiarities had been dragged in for exhibition.

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Now, the man in question had really been a most remarkable person. Born somewhere in the Fatherland, he had come to this country as a boy and labored steadily up the ladder to wealth, delving into all manner of things in the course of his progress. He had very little education and spoke broken English which was by no means of the cultured variety. Yet, with that peculiar type of magnetized digits that attract and retain wealth in any form, he had acquired, among other things, the ownership of several newspapers. Ownership, not editorship, please bear in mind.

In cross-examination on this case an attorney was attempting to show the incompetency, or some other disqualification, of one of the doctors who had examined the patient. To which end the attorney had perused all the written documents he could obtain bearing upon the doctor's connection with the case, and was adding willfully to the doctor's unhappiness by keeping him away from his office during his important office hours by long drawn-out questions about wholly inconsequential details. His object, of course, was to annoy the physician and tire him into some statement that could be usefully distorted.

Presently he seemed to have succeeded. In response to a question, the doctor had replied that the old gentleman under examination was the

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peculiar bombastic, dominating type of the "ignorant and illiterate German" in this country, whose heads as well as their abdomens are somewhat inflated by unexpected wealth. Here were nuts for the attorney. The doctor had stated that this man was "ignorant and illiterate," apparently forgetting for the moment that the old gentleman was also the owner and proprietor of several publications. Proprietorship of large publications and illiteracy seem so entirely incompatible.

"Now, Doctor," the cross-examining attorney began, "you referred to my client as uncultured and illiterate, or something to that effect. But perhaps you were not aware when you made this statement that this defendant was a publisher—the owner and publisher of some great newspapers. Don't you think it unlikely that an uneducated, illiterate, uncultured person could conduct successfully a great publishing business?"

The opposing attorney was on his feet in a moment objecting to the question. His witness had made a slip. And if it could be shown that his judgment was at fault about such an important thing as this, confidence in his entire testimony would be shaken. And so he offered an objection on the usual legal grounds.

The judge overruled the objection at once.

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But the attorney, now thoroughly wrought up by the doctor's entanglement, offered another objection, and still another. But the best he could do was to compel the opposing attorney to change the form but not the import of his question.

As closing the incident, therefore, the judge instructed the witness: "You may answer the question, Doctor."

"Let me see if I understand exactly what you are asking," the doctor said to the cross-examining attorney. "As I understand it, you are asking, in effect, whether an uneducated, illiterate person could establish and conduct a great publishing business successfully?"

"Yes, that is in effect exactly what I am asking," the attorney agreed.

"Most assuredly he could," the doctor replied. "And I base my belief on my personal knowledge of the actual fact that one of the largest publishing houses today, which has produced two of the largest, most scholarly, most comprehensive publications printed in any language, was founded and is conducted at the present time by a man who has so little education and is so illiterate that he does not speak three consecutive sentences without some grammatical slip. There is no secret about the manner in which he muti-

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lates the English language, yet he is recognized as a Napoleon among publishers."

The doctor glanced in the direction of his own attorney, smiling just a little at that gentleman's change of countenance. "I am not speaking from hearsay, but from my knowledge as this man's physician and friend—and ardent admirer," the doctor added. "Indeed, some of his characteristics remind me forcibly of this old German gentleman, illiterate but intelligent."

CHAPTER III

JUDGE NOT BY THE SPOTS

SOMEWHERE back in prehistoric time a wise man warned everyone against judging a man by his appearance. Succeeding wise men reiterated this advice. And Mark Twain made a classic of the admonition, using frogs and spots and jumping capacity in illustration.

An ability to “size up” a witness—pre-judge his capacity by his “spots”—is one of the greatest courtroom assets for an attorney. Particularly is this true as regards expert witnesses in general, and medical experts in particular. For medicine is not an exact science; and many medico-legal items are matters of opinion with a wide range for difference of perfectly honest opinions.

The medical expert possesses a vast fund of wisdom about which even a very keen attorney can have only a surface knowledge. Wherefore, the wise cross-examining attorney usually avoids frontal attacks, and attempts to discredit the medical expert in the eyes of the jury without really getting into the dangerous pool of actual knowledge. He does this on the accepted legal

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principle that if even a single statement of a witness may be doubted, his entire testimony may be discredited.

Nothing discredits an expert witness more than merited ridicule, and most lawyers use this legal weapon, where possible. But sometimes it backfires, and the results became classics in medico-legal history.

Thus, a few years ago the late Dr. Spitzka, world famous alienist, had given some very damaging testimony on direct examination in a certain case. The cross-examining attorney, aware of the alienist's fund of knowledge, and knowing that there was no likelihood of shaking his testimony by the usual methods of cross-examination, took a flyer at ridicule.

"Let me see, Doctor," he asked, "you are a veterinary, are you not?"

The courtroom chuckled to the full surreptitious extent permitted in courtrooms. But a moment later the chuckling recoiled upon the attorney when the alienist replied:

"Well, not exactly, although I sometimes treat asses."

That sort of reply, at the very beginning of the cross-examination, smooths out the rest of the journey for the expert. "First blood" puts him in good standing with the jury—which helps.

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But sometimes a parting shot has precisely the same clarifying effect. Indeed, up to the very last sentence of an expert witness's testimony, there is always a chance that he will lend a telling blow from some entirely unexpected angle that will get the good graces of the jury. For, like the rest of the world, juries are often swayed by trifles.

A somewhat similar instance, or at least one in which the "horse doctor" element was involved, occurred many years later, and under quite different circumstances, but with very much the same effect.

It occurred during a murder trial in which the subject of narcotics and the effect of all kinds of narcotic drugs was involved. The medical witness under examination had shown a very comprehensive knowledge of such narcotic poisons as opium, cocaine, and chloral, but had stated frankly that he knew very little about the peculiar Mexican drug, marihuana.

The cross-examining attorney was the late Earl Rogers, master of masters in the art. With the courteous and scholarly suavity which puts the witness off his guard, and often leads eventually to his undoing, Rogers was apparently properly impressed with the physician's great knowledge of ordinary narcotics, and lingered at some

length over the effects of opium and cocaine. Then he referred to marihuana, the deadly Mexican weed that produces a kind of insanity. But as yet the attorney was unable to "size up" the witness, to estimate his ability to take punishment. So Rogers suddenly changed his tactics.

"Doctor," he demanded, turning suddenly upon the witness, "don't you know, Sir, that marihuana will make even a *mule* crazy?"

It was the kind of shot that had upset many a witness, this sudden explosion following the suave placidity, but this time it miscarried. The physician simply smiled indulgently, and raised his hand in deprecation as though regretfully correcting a little mental slip of a personal friend, and replied: "Oh, but Mr. Rogers, you forget that I am not a veterinary!"

The laugh was on the attorney. And he laughed with the rest of the court room and just as heartily; for Rogers was one of those rare attorneys who could appreciate a joke either way.

Dr. Joseph Collins, the celebrated neurologist, had given some very explicit and damaging testimony on direct examination in an important case. The jury seemed favorably impressed. And, as frequently happens in the matching of keen wits, the attorney's cross-heckling had strengthened rather than weakened the expert's testimony.

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The attorney himself realized this, and began fumbling for a way to let go gracefully.

"After all, Dr. Collins," he suggested, "you are a neurologist pure and simple, are you not?"

To which the doctor replied, blandly: "Well—reasonably pure and entirely simple."

However, in the case of such famous witnesses, the cross-examining attorney is forearmed; the "spots" are obtrusive. It is the newcomer who is likely to make trouble, to be misjudged and undervalued. The young, downy-cheeked and recently graduated physician, full of classroom lore, frequently makes legitimate and easy picking for the attorney. Sometimes he doesn't.

For example, the experience of a certain prosecuting attorney in the county seat of a small town in the Middle West, is illustrative. This attorney was in deep trouble, such trouble being a very common complaint among attorneys. It consisted in not being able to get the physicians whom he had called in a certain medico-legal case to give him the information he wished. Indeed, when the opposing attorney had finished with said physicians, such part of their testimony as remained at all in evidence, was largely in favor of the other side. Wherefore the depression and discontent of this prosecuting attorney.

The case was one in which the disease, epilepsy,

was an issue. And although epilepsy is a very terrible condition, and not a very unusual one, it is of such a nature that the average country physician does not come in contact with cases very often, or in very intimate contact with such cases as he does see. As a result, the average medical witness is vulnerable on the ground of inexperience.

The prosecuting attorney had found him so. Wherefore his soul was sorely tried as he walked down the street during one of the short court intermissions.

As he turned the first corner, he almost bumped into a man coming from the opposite direction, a young physician who had recently located in the town, and with whom the attorney had only a nodding acquaintance. The new medico was an alert, upstanding young fellow, a novice at the medical game as measured by years, at least, and as yet not heard from very much, one way or another in the community.

As he and the prosecuting attorney nearly bumped into each other, each immediately offered profuse apologies. And then it flashed into the attorney's mind that perhaps this near-collision might prove one of those enigmatical ways of Providence for pulling distressed attorneys out of legal predicaments. Perhaps this new physi-

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cian possessed some knowledge of the disease, epilepsy. And, since he seemed to have at least a glimmer of intelligence, could impart this knowledge to the jury. Anyhow, almost any port in a storm is better than the open ocean.

"See here, Doctor," the attorney asked, "do you happen to know anything about epilepsy—that is, I don't mean exactly that, I mean—do you think you know any more about epilepsy than you do about the general run of medical subjects, so that you would be able to tell the jury something about it?"

The young doctor straightened up and laughed a laugh that inspired confidence. "Do I?" he grinned; "well—just try me." And, as an aside, he added the mental reservation: "For I sure do need the money."

The prosecuting attorney whirled about and, taking the doctor by the arm, headed him towards the courthouse. As they walked along, he staccatoed an outline of his case, arriving at the entrance just as court was being called. As a result, it was not until the young physician was actually in the witness chair that the attorney realized he had allowed his eagerness to take a grab bag chance—he had not found out, or inquired, just what grounds the young man had for his claim to any unusual knowledge about epi-

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lepsy. So, too late, he realized that more than likely he was about to deal another hand of cards to his opponent.

Now, it is usual in such cases for the prosecuting attorney to "qualify" the witness by asking him pertinent questions about the amount and kind of experience he has had with cases similar to the one under consideration. In short, to demonstrate to the court that the witness has a right to give expert opinion. It is not necessary, but if omitted the opposing attorney may jump to the conclusion that the witness is not really an expert. The mere fact of being a physician does not necessarily qualify a doctor as an expert in special cases.

The prosecuting attorney was alert to this situation, of course, but since the exact depth of the mire is inconsequential once you are in, he decided to let the "qualifying" questions go by the board, hoping against hope that the opposing attorney might be caught napping. Also, there was still the possibility that the young man might really have something intelligent to say to the jury.

So the attorney merely asked the formal question as to whether the doctor was a licensed physician, and then requested him to "tell the jury in his own way something about epilepsy

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and the effect of this disease upon the person afflicted with it." Which the young doctor proceeded to do, in a manner that, for the time being at least, was most gratifying to the prosecuting attorney. For, whatever his shortcomings in the matter of youth and experience, this young physician did know many things about epilepsy. And he told them in the most explicit, convincing manner, quoting from books and citing authorities, and giving examples.

Yet the prosecuting attorney realized that this was simply respite; the wrath was yet to come. The things this young man was saying were obviously taken from books; and "book learning" gets scant consideration in the eyes of the public as compared with actual experience. It is a common community opinion that an old doctor, full of years of practical experience, is a far better doctor, "drunk or sober" than the young graduate, teeming with text-book and class-room knowledge. And, of course, on the witness stand the opinion of the old fellow carries much greater weight with the jury than that of the very glib, but smooth-cheeked novice.

Wherefore, when the prosecuting attorney turned this young physician over to his opponent for cross-examination, his sentiments were precisely those of that insolent European monarch

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who exclaimed: "After me, the deluge!" And, although everyone else in the room had precisely the same sentiment, the cruelty of the situation was intensified by the fact that the young physician himself did not grasp it—did not sense that his executioner was about to spring the trap.

The opposing attorney was a tall, stately old gentleman, frock-coated, with pointed goatee and flowing gray mustachios. He exuded the kind of cutting courtesy which never wavers in punctiliousness even when twisting heartstrings out of their sockets, as he rose majestically and took charge of the examination. One need not hurry when administering slow torture.

This attorney had made careful note that the prosecuting attorney had failed to "qualify" the witness.

"How old are you, Doctor?" he asked, as an opener.

"Twenty-six," the doctor answered.

"And how long have you practiced your profession, Doctor?" the attorney pursued.

"A little over two years," the doctor replied; "one year in a hospital, and a little over a year in general practice."

The statement seemed to astonish, amaze the befrocked and dignified old questioner. "Two years?" he asked, incredulously. "You mean to

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say, Doctor, that you have had only two years of experience in the practice of an art directly responsible for human lives?"

"I object," the prosecuting attorney snapped. "He has answered that already."

"Sustained," said the judge. It was the first and only objection made by the prosecuting attorney, however, and he did this largely through force of habit. For he knew that in the end, whether he "objected" or not, the cross-examiner would work his will upon his victim. So, having allowed himself the pleasure of this one explosion, he settled himself in his chair, reconciled to letting things take the inevitable course.

The actual form of the long drawnout verbal castigation that followed is of no consequence. But the net results was to develop the fact that four different physicians had testified in his particular case, the youngest of whom had been in practice at least twenty years. One of them, indeed, had been suffering the fruits of his profession for over fifty. And yet, even this patriarch had seen only four cases of epilepsy during his long period of practice; and none of the other physicians had been even that fortunate.

The object of this catechizing was obvious. Here was a young upstart doctor—a mere boy,

with practically no experience in the practice of medicine—who was pretending to oppose his knowledge of this rare disease, epilepsy, to an array of old-timers of such protracted experience. The futility of such an attitude was obvious; but it was one that deserved prolonged attention by the cross-examining attorney. And for fully an hour he dallied with it, emphasizing his point by insinuation and innuendo, but withholding the inevitable question that everyone knew was coming until the precise psychological moment to produce the most telling effect.

The young physician was a likeable sort of fellow, and, although a newcomer in the town, had made a number of good friends. Moreover, his testimony, snappy and to the point, had pleased the audience, most of whom hated to see him dragged up so high for such a long, hard fall as was coming.

The grizzled old clerk of the court, standing beside a deputy sheriff, whispered the general sentiment of the audience:

“The old devil!” he said, referring to the attorney. “Why don’t he ask it and get through with it? Everyone knows what he’s after, and that he’s going to get it. But what’s the use of dragging it out? A respectable tomcat wouldn’t use a mouse that way.”

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But now the old legal feline was ready to make his kill.

"Doctor," he asked in his most ingratiating, persuasive manner, "you are aware that these other five doctors, whose statements did not agree with yours, have been in the practice of their profession for an aggregate of one hundred and fifty-five years all told, and that the total number of cases of epilepsy they have seen during those one hundred and fifty-five years of practice is less than a dozen—precisely eleven, to be exact?"

The young doctor admitted that he was aware of this fact.

The old attorney drew himself up to his full height, inflated his entire quota of dignity, and launched his final shaft:

"These physicians have seen precisely eleven cases of epilepsy, and no more, during the one hundred and fifty-five years that they have been engaged in the practice of medicine, and you have been practicing medicine two years, Doctor. Tell me," he shouted, leaning forward and pointing his finger accusingly, "tell me, on your oath, how many cases of epilepsy you have ever seen in your whole life, Doctor?"

As he roared his last word the old ogre "held the pose," quivering, extended finger still pointing, while he waited for the answer. He was

still posing and quivering when the young physician answered calmly, truthfully, and with just a suggestion of an impudent smile on his lips:

"About two thousand cases, Sir. I have the complete records of thirteen hundred and twenty-one cases in my office."

Needless to say, the courtroom was an uproariously disorderly place for the next few moments. Even His Honor lost his wonted composure and jiggled the back of his high chair to a somewhat undignified degree. And the old clerk of the court, forgetting the dignity of his position, dealt his friend, the deputy sheriff, a blow on the shoulder which sent that worthy gentleman staggering against the wall, unresisting and unresentful; while the court bailiff, for the moment forgot to rap for order.

A wise person somewhere has made the observation that some people never seem to know when they have had enough. This observation, generally speaking, is not intended to be complimentary. This old attorney was "still looking for more," even after he discovered that the young doctor had made a special study of epilepsy during his student days as an interne in the largest institution for treating epilepsy in this country. A really great lawyer would be very careful not to stir up any further possibilities. But this pom-

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pous, frock-coated old gentleman was not really a great lawyer. Moreover, he had been stung on his most vital part, his pride. Also, he was mad clean through, which is bad for one's judgment.

And so, blinded with rage, he waded straight in to just clear things right up in a verbal slugging match. First, he made the young physician admit that epileptics, as a class, were not endowed with extremely high intelligence. Then, encouraged, and also irked by the young doctor's tantalizing grin of deliberate confidence, and his own inability to disturb it, he launched mistake number two.

"You say, Doctor," he queried, "that most epileptics are not very intelligent? Isn't it a fact, Doctor, that *no* epileptic is *ever* very intelligent?"

The young doctor took his time about replying, ostensibly reflecting as though the subject was a very novel and weighty one.

"Well, that depends entirely upon what you mean by 'intelligence,'" he said, still with that lurking grin. "You know, of course, that Julius Caesar, and Napoleon Bonaparte are credited with being epileptics, and old Oliver Cromwell was strongly suspected of having a little touch of this malady; yet, each of these men is supposed to have had considerable intelligence, as I understand the term."

CHAPTER IV

CRAZY UNTIL PROVED SANE BEYOND REASONABLE DOUBT

IN AMERICA every person is considered sane and innocent until proved crazy or guilty beyond reasonable doubt—that is, theoretically. In the practical application of the theory, however, sane and innocent people frequently get locked up. The law seems to feel that this trifling matter of being locked behind iron bars for a few inconsequential days should be wholly disregarded by the unlucky, but sane and innocent individual. Like Rip Van Winkle's extra drinks between times when he had sworn off, "this time don't count."

Possibly you doubt this statement about the infringement upon your vested liberty and sanity, and your liability to innocent incarceration. If so, wise carefully some of the court records, as illustrated by the little legal pleasantries that happened recently to William and Joe Johnson, father and son respectively.

The main show in the Johnson family was pulled off when father William Johnson had son Joe locked up because William said that Joe

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was crazy, and signed his name at the bottom of a legal document to prove it.

That was the first act. But the curtain was hardly down before father William found himself locked up behind the same set of bars as son Joe, landed there because Joe's buddy, who, like Joe, had been all mussed up in France by German gas and shells, asserted that the really crazy member of the Johnson family was not son Joe at all, but father William himself.

And so, bearing out the legal fiction about being considered innocent until proved guilty beyond reasonable doubt, both father William Johnson and son Joe Johnson were locked up securely under the sheriff's care in the same ward.

Now, of course, there is a vast difference, theoretically at least, between being locked up because you are suspected of being a criminal, and being jailed because it is suspected that something is askew in your mental machinery. But the difference is not apparent to casual observation. The locks and bars are equally strong, and frequently identical, in each instance. There is, however, a vast difference in the ultimate results. Law-breaking has become such an everyday affair with us, that a few trivial days, more or less, of being locked in with "checkered

sunlight," does not leave much of a smudge on the average American's escutcheon in community estimate.

But in the case of suspected lunacy—that is a very different matter. Almost anyone would rather be called criminal than crazy. For in law, at least, insanity is considerably more of a crime than a disease.

Law-making dates back to the Dark Ages and seems to have fossilized there. It is the work of lawyers, who find it hard to realize that insanity is not really a form of crime, as it was in the good old days of witch-burning. And so the law has not changed very much, and public sentiment scarcely at all in its practical attitude toward "lunatics." A suspected person usually prefers the stigma of a sojourn in jail than confinement in a hospital where he is suspected of being "crazy."

Now, to be perfectly fair to our legal methods, there is very little chance that any really sane man will be placed behind bars permanently—"railroaded," as they term it. Indeed, it is for the express purpose of preventing this same railroading that laws, and more laws, have been enacted, to such an extent that it is now possible to lock up a man to determine whether or not he is really crazy. In short, we are so eager to do

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justice to a suspected person that we lock him up and bring him before a court to prove definitely and legally to all the world that he is not insane, and should not be locked up.

It is a great system, but, meanwhile, the victim spends a week locked behind iron bars just as firmly as if he were a murderer. And, incidentally, acquires a stigma scarcely less enviable. It is just a little like the reformer person who is going to make you happy even if he has to pound in the happiness.

And so William Johnson, the accused father, and Joe Johnson, the accused son, spent a week locked behind humanely steel bars before being brought into court. Then, on the appointed day, father William was ushered into the court room to have his case decided by the eminent Judge Hartley Shaw and his associates.

True, the only accusation against the men was that they had committed the crime of having the sickness called insanity, seemingly a thing for a hospital rather than a courtroom. But the law thinks otherwise. And, being the law, it must be right, of course.

So William faced a learned Judge who was flanked on each side by a medical specialist. Also by the witnesses, Paul and Tom, and the inevitable lawyer "friend" willing to sacrifice

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his valuable time in the cause of freedom—*plus* an almost inconsequential emolument.

Thus the majestic Juggernaut of the law was set in motion to determine whether or not William Johnson, a little, wizened Cockney, was or was not sick.

William's seat was in the center facing the judge, the accusing Buddy was on his left, and his lawyer most appropriately sat on his right, fairly scintillating with intellectual pearls.

Buddy, as the accuser, talked first and gave his reasons. Father William was crazy, he believed, because he quarreled with all his neighbors and thought they were going to harm him, imagined people threw rocks at him, heard imaginary people talking to him, picked peculiar friends, and acted in an eccentric manner—in short, gave more evidence of having real mental trouble than is the case with the mere garden variety of eccentric cranks.

Other witnesses followed Buddy and confirmed his testimony. While friend lawyer had himself called as a witness, took the stand and told things that ought, at least, to have influenced the learned judge and his flanking physicians.

During all this ordeal father William conducted himself very much as any sane man would have done under the circumstances. So that, to casual

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observation at least, the case stood rather in his favor at the close of the hearing.

And now the judge did a thing that showed how wisdom and common sense sometimes rise above the letter of the law. He withheld judgment on William's mental condition. But, since the time had now arrived for son Joe's trial, and as William was the accusing witness, the judge requested William to take the witness chair while son Joe was brought in and placed beside his father.

Now, it is a very different matter to act as a witness in your own behalf rather than for another. It involves an utterly different kind of psychology and has a peculiar effect upon the individual—as anyone can testify who has ever tried both positions. And this presently revealed itself in the case of William *versus* Joe.

Seated beside his son in the witness chair, William was no longer the repressed person on the defensive, but, on the contrary, was the aggressor and very much on the offensive. He was now the accusing witness, who said that Joe's mind was ungeared, and it was up to him to prove it.

The effect of this situation was illuminative, and just what the wise judge had expected. For now, all restraint removed, William plunged into

his story with ardent abandon, relating all manner of things about his son and his neighbors, and the universe in general, as he saw it. Unconsciously he dropped his guard, let himself go, and revealed the abnormal twistings of his mind about things that he had carefully covered up before.

Few people, aside from those who are accustomed to intimate observation of the insane, appreciate the importance of a person's actions, manner, and general appearance as determining mental unbalance. To the trained observer, however, these things are often the most important ones. Frequently, he can make a correct diagnosis on these things alone. Indeed, the laboratory "tests" that are prattled in popular literature, are almost wholly chimerical. The trained alienist makes his diagnosis largely by the "scientific once over" that he gives the patient while engaging him in conversation; and the judge of a lunacy court acquires the same skill and adopts the same methods.

It follows that, although the statements of a witness may seem entirely logical to the uninitiated, his manner of making them and his general appearance may reveal to the judge that there is something wrong in the brain centers.

This was the case with William Johnson, the

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accuser. All unconsciously, as he rattled on untrammelled in his story of grievances, he was guiding himself safely into custodial care. Also, he was unlocking the doors for Joe.

When he had finished, the judge turned to one of the medical advisers beside him and asked, with a peculiar little twinkle: "What is your opinion now, Doctor?"

And the doctor, in reply, simply pointed to the diagnosis written in William's case which indicated that he, not son Joe, was the sick man. So, five minutes later, son Joe, the tall, straight young soldier—straight, despite the scars made by his country's enemies—walked out of the room a free man.

A free man, yes! But bearing the unjust but indelible stigma, which our gossiping world refuses to erase, of having been locked up for a week accused of being crazy. Wherefore, it appears that, in practical results at least, there seems to be a little joker in the bit of legal verbiage which declares that "a man is considered sane until proved insane beyond reasonable doubt." And the "joke" is on the unlucky fellow who has to be locked up to prove that locking him up is wholly unnecessary.

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WHEN DOCTORS DISAGREE

In Pope's time, it seems to have been an open question as to "who should decide when doctors disagree." We know the answer now, as proved by the case of Charles Ackman.

Charles, a wounded war veteran, now completely recovered, was riding home from work one day in an electric express train. He was reading a newspaper. Two weeks later, in a hospital, he began showing signs of returning consciousness. His car had collided with three heavily loaded freight cars with such force as to send them down the track three or four hundred yards with all brakes set.

Following these first signs of returning consciousness, Charles made other manifestations of convalescence. But it was slow, and he did not get very far, as frequently happens in cases of fractured skulls, or brain shake-ups.

Now, in cases like this where the railroad company is clearly at fault, there is usually a financial adjustment between the representative attorneys, thus saving the expense of a trial with the possible idiosyncrasies of a jury, either way. But for some reason, which the railroad company did not divulge, this particular case was brought into court to be fought to the last ditch.

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The only matter in dispute was the question of Charles' injuries. An imposing array of physicians, representing Charles, testified individually and agreed collectively that the fracture or injury to Charles' skull had produced the following result:

The sight in both eyes was impaired with total blindness almost a certainty in the near future; there was total deafness in one ear; his mind was clouded and would continue to deteriorate into complete dementia. In short, the future outlook for this unfortunate ex-soldier was blindness, deafness, and the total loss of mental faculties.

Many items in the field of medicine are questions of opinion, not matters for exact scientific determination. Such is not the case, however, as regards most conditions of the eyes and ears. The examination of the organs of sight and hearing has been evolved almost into the field of exact science, with guess-work pretty well eliminated. So the future blindness and deafness of Charles seemed definitely assured, agreed to by half a dozen perfectly capable and entirely honest expert physicians who represented him.

Yet, the pair of medical experts representing the railroad company, although undoubtedly learned and apparently perfectly sincere and honest, flatly contradicted the opinion of their

colleagues. With precisely the same evidence before them, these physicians declared that Charles would not become blind, was not so very deaf, and was not losing his faculties at all. Indeed, they asserted that the young man was very much *un*-demented—was, in fact, a “faker” who was feigning certain symptoms and putting belladonna in his right eye for the purpose of dilating the pupil and deceiving his honest, but gullible physicians.

It was an astonishing, and a very unusual situation: two sets of medical “experts” disagreeing diametrically, and apparently honestly, in the one field of medicine where facts are actually facts. Yet it was one that the attorney for the railroad could have cleared up immediately had he seen fit to explain that for some time past a detective had been shadowing Charles every day. He might have explained further, that the railroad physicians knew the result of this detective’s observation which was in effect, that Charles was a harum-scarum young man, who frequently crawled out of the back window of his home in the middle of the night and indulged in riotous living, dance halls, girls, and all manner of questionable things. Yet, when Charles went to the doctor’s offices for examination, he must be led and guided by a sympathetic relative.

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Yes, the pupil of his right eye was enlarged above normal, the defense doctors agreed, and the nerve of his right ear deadened. But this was all the work of belladonna, or something, which was dropped into Charles' eye at intervals between his surreptitious escapades.

The medical world at large knows that belladonna will not produce such complex effects; probably the defense experts knew this, also. But—there was the report of the detective, proving that Charles was a slithering creature. Possibly unusual effects could be produced by medicines in the case of a person of such deceptive mental make-up. And, anyhow, science should not be prostituted to defend impostors.

So, as a final touch and bombshell, the railroad attorney brought the detective into court. Before placing him on the witness stand, however, he held a moment's whispered conversation with the officer.

"Where is he?" the detective inquired looking about the court-room.

"Why, right there!" the attorney whispered, indicating Charles.

"Him!" the officer exclaimed. "Hell! I never saw him before!"

He had been shadowing the wrong man, Charles' harum scarum brother! But the jury

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did not know this, because, naturally, the detective did not take the witness stand. Yet, as frequently happens with juries even when confronted by contradictory experts, truth did prevail as it is alleged always to do eventually, and Charles received substantial compensation for his injuries.

Which seems to answer very definitely Mr. Pope's query as to who shall decide when doctors disagree: The jury—twelve good men (and women) and true.

CHAPTER V

THE TRUTH BUT NOT THE WHOLE TRUTH

THE law, like the Constitution, is subject to amendment. And apparently, as in the case of the poker game at Red Dog, the sky is the limit. Nothing is sacred to the legal amender, once he sets his mind to it.

A peculiarly critical situation had developed in a case in which the testimony of an important witness if given in a certain way would prove fulminant. If he testified to certain things, which almost everyone believed he would if he testified truthfully, there would be a terrific legal explosion. If he failed to testify in this way, the whole thing would collapse and with hardly a ripple. And what made the situation particularly acute was the fact that this witness' testimony could not be challenged.

As was anticipated, this testimony proved to be of the pacifist variety. So, instead of a legal cyclone, a gentle zephyr wafted the case out of court.

"Which leads me to believe," the defeated attorney confided to his friend, the judge, as His

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Honor left the bench after making his decision, "that our friend, Tom Bailey, ought to go on and complete his 'Amended Proverbs.' You see," he explained, "Tom has an idea that the old Biblical proverbs are not adapted to modern legal procedure. So he has gone about amending them. I don't know just how far he has progressed with the amendments, but I am familiar with one that is peculiarly applicable in this case. This is it:

"'A false answer turneth away wrath; but truthful words stir up anger.'"

However, it isn't merely truthful words that sometimes stir up anger. Sometimes the witness under cross-examination will use an expression which gets the desired effect without being really untruthful. The English language of the British lends itself peculiarly to this sort of thing on occasion, when used in American courts. English is not synonymous with American when it comes to colloquial expression, as the traveling American quickly discovers on his first purchasing tour in English shops. He may get what he is seeking, but frequently he gets it under an entirely different name—an English, not an American name. Sometimes this difference crops out in our courts.

A particularly scholarly English physician of

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wide repute, deep learning, and entire assurance in the witness chair was undergoing cross-examination in a case where the sanity of a person was involved. The cross-examining attorney asked this witness a long, rambling, complicated question consuming two closely written pages of legal cap, and touching upon varied features of the case.

To which the learned physician answered, calmly:

"Quite."

The cross-examining attorney looked at the witness in amazement, and stood waiting a moment.

"Do I understand—er—is that your answer to my question?" he blurted.

"It is," the doctor shot back. "Did you not understand me? *QUITE—QUITE!*"

It was a perfectly good English answer; but it wasn't American. Yet the lawyer was obliged to accept it.

When a witness has fabricated a nice piece of testimony, or, at least, when there is good reason to think that his testimony is fabrication, it is natural to wish to tell him so. But, of course, this is not permitted. It may not even be hinted at directly. But sometimes the cross-examining attorney, skilled in irony and innuendo, may get

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this impression to the jury without transgressing legal tenets.

"Let me see, you are a literary person, a writer, I believe?" an attorney asked one of these witnesses whom he suspected of fabricating his answer.

The witness snapped back a reply in the negative.

"Oh, I beg your pardon," the attorney apologized suavely; "I had the impression you were a writer of *fiction*." Which was just a legally admissible manner of calling a man a liar without using the word.

Lawyers of a certain type frequently prosecute cases on the contingency basis. If they win, they receive pay. If they lose, they do not. In short, their fee is dependent upon the outcome of the case. Physicians are not ethically permitted to do this sort of thing. It is considered on a par with receiving nothing if the patient dies, getting the fee if he recovers.

In other words, the doctor is not supposed to be financially interested in the outcome of the case, simply in the scientific facts involved. But sometimes the attorney wishes to convey to the jury that the doctor is interested in the outcome of the case, and not purely from a scientific motive.

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"You are greatly interested in the outcome of this case, are you not, Doctor," the cross-examining attorney insinuates.

To which the doctor replies suavely: "I fear you are confusing the methods of my profession with those of your own"—an answer that is not "responsive," legally speaking, but which reaches the ears of the jury just as effectively as a perfectly legitimate one.

Before any witness is permitted to tell his story to the jury he must be "sworn." That is, he either raises his hand—the right hand, specifically, if he has one—or kisses the Book, or goes through some other form of incantation, and declares solemnly that he is about to tell "the truth, the whole truth, and nothing but the truth."

And thereafter, as every one knows who is at all familiar with legal procedure, he will not by any chance be permitted to keep his oath. There is only the remotest possibility that he will be allowed to tell the *whole* truth about any subject whatsoever, no matter how eager he may be to do so. All of which would seem to place the solemn process of hand-raising and Book-kissing in the limbo of legal pleasantries, or sociolegal amenities, as it were.

The very idea of allowing any witness to take

the stand and tell a straightforward story in his own way, is quite beyond the range of legal imagination. They do it in France, to be sure. Indeed, they even allow the witness to express an opinion. But then, the French are a very opinionated people.

However, there is always a reason for any established custom. And the law is strong on reasons and explanations, even though sophisticated ones. "What would become of all us lawyers," one attorney parried, with a grin, when the question was put to him, "if a fellow were allowed to tell all he knows on the witness stand, and without his attorney's help? Truth must and will prevail always, of course. It is so written. But there is such a thing as having it altogether too easily prevailable."

To the lay mind it would seem that the cause of justice might be better served if a witness were permitted to tell his story in his own way instead of being herded through a mental cattle-shoot into the desired stall. For, under our present legal system, it happens frequently that some of the most vital testimony—testimony that might be absolutely determinative—cannot be introduced. And, of course, the more skillful the defense lawyer, the less likely he is to permit this very kind of testimony to get before the jury.

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True, this is a two-edged blade, as its wielders sometimes discover. Thus, on one occasion where the opposing lawyer was attempting to introduce such testimony and found himself blocked at every turn by legal technicalities, he was driven to the unethical expedient of suggesting: "Common sense indicates that this testimony should be admitted."

Which brought the opposing attorney, the redoubtable Paul Schenck, to his feet with the objection: "This is not common sense, your Honor, this is *law*!" It proved so. And "common sense" went by the board.

"The truth, the whole truth and nothing but the truth," therefore, is often just a little piece of legal verbiage. It makes the witness untruthful right at the start—legally untruthful, at least. Which may possibly be a helpful conscience-salve to evasively inclined witnesses. And since it works both ways and equally for each side, there is small chance of changing it. One wag suggests that it is the legal origin of the "intelligence" test which is made by cutting out the first and last part of a sentence and a few words in the middle and then expecting a person to know the meaning of the sentence itself. But whatever its origin, it is Law, even though not common sense.

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One should bear in mind that the word "truth" is a somewhat elastic term, legally speaking. And time and custom modify this elasticity. There have been periods in the progress of the world when it was considered justifiable, even in good society, to speak the truth, but not the whole truth, and make "mental reservations" for the rest. In certain of the old Inquisitorial proceedings, for example, the witness might say one thing and think another without endangerment to his body here, or his soul hereafter. And, although this little legal amenity is now discountenanced, there are other lawful subterfuges for keeping the whole truth out of the testimony that are quite as humorous and just as effective as the older methods.

Thus, the matron of a sanitarium, not long ago, was sued by one of her employees for damages resulting from an injury received at her institution. Among the injuries alleged in the complaint of the victim was one to the effect that the accident in question had produced an impediment, or speech-defect.

Now, obviously, if it could be shown that speech-defect had existed in the injured party before the accident, the whole fabric of her claim would crumble. And, as it happened, such proof was at hand. But it was not available, for the

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very effective reason, best known to lawyers and not understood by anyone else, that the testimony was "technically inadmissible."

The person against whom the suit was brought was a charming Southern woman who spoke with a delightful "Southern accent," and inflection. This peculiarity of her speech was the subject of banter between herself and a shrewd down-east, nasal-talking Yankee physician, who visited his patients daily at the Sanitarium. The fact that the old gentleman had fought in the Northern Army and that the little lady was a "Reb" and that both of them possessed a keen sense of humor, accounted for frequent sallies.

Now, it happened that one afternoon when the doctor was visiting his patients at the Sanitarium, a new nurse arrived. She had come seeking employment, and her application found favor in the sight of the little Matron because the girl was a native of her own state, a little "Reb," too. Introducing this new nurse to the old doctor, the Matron mentioned the fact that "she must be an excellent nurse, for she comes from my own state, Virginia."

Naturally, with this introduction, a few sentences of social amenities were exchanged, and then, as the doctor and the Matron walked out of hearing, he remarked to his companion, in a

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bantering way: "I notice that Miss J. has even a broader 'Southern accent' than you have, Mrs. B."

"Ah, but that is not all 'Southern accent'," the mistress of the sanitarium sparred, defensively. "That is a speech defect—an impediment, Doctor." The old doctor chuckled at the rise. "Oh, sure, I know that, of course," he laughed; and went on his way visiting his patients.

Two hours later the new nurse tripped and fell down a stairway. And about eighteen months after this, her suit for damages came into court. One of the damages alleged in this suit was an injury to her speaking apparatus, the nurse asserting that in falling down the stairway she had wrenched her neck and produced a speech-defect.

Now, during the course of the eighteen months that intervened between the accident and the bringing of the suit, many events had occurred in the life of the active old physician which would tend to make him forget such a trivial thing as the advent of a new nurse at one or another of the numerous sanitariums he visited. Nurses were forever coming and going. And if he had been summoned as a witness to testify about almost any one of these nurses, it is more than likely that he would have been unable to remember anything

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in particular about most of them. Moreover, the judge and jury in listening to such testimony would surely look askance at the statement of a busy physician which pretended any very exact remembrance of these cases, unless he could show that some special event had fixed it in his memory.

In this particular instance, as we have seen, there was the special incident that fixed the circumstance in his memory. He remembered very distinctly that this new nurse had a speech-defect, not because he had noticed the defect itself, but because he had bantered the Matron about it.

When he took the witness stand, however, and attempted to explain how it happened that he recalled this particular incident, since the whole case seemed to hinge around the point as to whether or not the nurse had a speech-defect before the accident, he was prevented from doing so by legal technicalities. He was not permitted to present to the court the all-important and most vital part of his testimony.

Now, of course, on such occasions the witness himself, although a vitally interested person, is not officially permitted to participate in any discussions about the matter. That would be permitting common sense to trickle in and pollute the legal Pierian spring. But even a mere witness may make an unofficial suggestion to his Honor,

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particularly if he is an old and honored physician in the community who has known the Judge ever since he was a boy.

"Your Honor," this old physician ventured with just a suggestion of a twinkle in his eye, "I hate to be forced into committing perjury."

The judge sensed something unusual. But the judge of a Superior Court is not supposed to see a joke even when he does. There is nothing facetious in law except its own inherent absurdities. And so the judge solemnly warned the old physician that he must not under any circumstances commit perjury, let alone "be forced to do so."

"But, you see, your Honor, I *am* being forced to do so," the old physician persisted, still with the little twinkle. "If I remember rightly, I raised my right hand and swore that I would tell not only the truth, but the *whole* truth. And now I am breaking my oath by not telling the whole truth—because this attorney won't let me."

The judge recognized the point; also the humor. But the letter of the law is inflexible. And so the doctor's little pleasantry fell on barren ground.

Furthermore, in his summing up, the adroit lawyer of the opposition made it appear that the

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old physician was warping, if not actually breaking, the truth. Also, that he was somewhat lacking in proper respect for legal procedure.

"What likelihood is there," he was able to ask in his argument, "that a busy physician, absorbed in a tremendously active practice, would remember in the course of a sixty-second casual conversation, whether or not any certain nurse had, or had not, a slight speech-defect?"

And, since the doctor was not permitted to explain just how it happened that he had noted this speech-defect, and the exact reason for his noting it, his entirely truthful statement carried no weight with the official listeners.

The jury suspected the old doctor of perjury, and rightly. He did, indeed, perjure himself—but legally, and quite over the head of the average juror. Had he been permitted to tell the most vital part of the entire incident, the case would have been given a very different complexion. Indeed, there can be no doubt that it would have been reversed.

Ah, well, there are none so blind as those who will not see, except, perhaps, those who are unable to see the woods for the trees. Legal technicalities are the trees and underbrush that obscure the forest of plain common sense justice in many instances.

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But here is an interesting paradox: While the law is forever prating about the truth and nothing but the truth, it is sometimes necessary to resort to trickery to get the full truth before the jury. For although the law does not permit the witness to tell the whole truth officially, or to give opinions, or speak of things he has heard, there are, nevertheless, ways of doing these things. And often they work just as effectively as an entirely official statement.

Thus, the witness who is on the alert, often finds a chance to slip in some important statement, which is promptly challenged and ordered "stricken out," so it does not appear in the records for the inspection of the upper courts. Also, the jury may be instructed to disregard it. But, meanwhile, the members of the jury *have* heard the statement. And, if it is important, they will not disregard it. Yet it is one of the puerilities of the law—like the childish game of make-believe—to assume that when a jurymen is told officially that he hasn't heard a certain thing, he will make himself believe that he hasn't.

Medical witnesses are peculiarly transgressive in this matter of telling important truths unofficially; and the presiding judge is likely to be somewhat indulgent about these transgressions. He

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knows that a high proportion of medical matters are things of personal opinion of the physician. Moreover, he takes into consideration the fact that medicine is a relatively untechnical subject as compared with law—knows that the physician is accustomed to deal in frankness rather than in technical evasions. And so, when the medical witness blurts out something that legally he shouldn't, the judge indulgently allows the statement to be stricken from the record without comment. But the jury has heard the statement; and sometimes the statement is made purposefully.

The weak link in the legal barrier to "whole truth" statements from the witness chair is the latitude allowed in "qualifying" an answer once it has been answered by the required "yes" or "no." In order that his answer may be "responsive" the witness must first answer the monosyllable affirmation or denial. After which he may babble all manner of irrelevant statements—things that may be stricken from the official records later, but which reach the jurors' ears. For it is the legal right of the witness to "complete his answer," and the worst the opposing lawyer can do about it is to have the answer stricken out later.

This is a legal flesh-thorn. But it is some-

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times comforting from the viewpoint of the expert witness.

Moreover, the most dangerous expert witness is the one who is ready to admit almost any generality on cross-examination, and who then "qualifies" his answer into a precisely opposite significance. For example:

The cross-examiner asks the witness: "Isn't it possible for a person to present such symptoms as you describe and still be simply shamming—faking?"

"Oh, yes," the doctor replies, fulfilling the legal obligation to answer "yes" or "no." But immediately he "qualifies": "But it wasn't so in this case—this man isn't faking; he's a sick man."

In a very important case that occurred in New York City a short time ago the decision hinged upon the mentality of a certain individual now deceased. Whether or not this person's mind was failing at a certain time was the crux of the whole situation.

A very learned, impressive, and important medical witness had been called, but because of the nature of his testimony he was not permitted to express an opinion about the patient's mental condition. Yet everyone knew that such an opinion from a man of his eminence would be

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most impressive. He knew it also, and he knew the attorneys did not intend to allow him to give such an opinion. And he found no way of giving it in the direct examination.

But there are always possibilities in the cross-examination—both ways. And presently the heckling cross-examiner asked a question which permitted the physician to slip in the statement that “the old gentleman seemed just like a child.” Instantly the cross-examining attorney was on his feet objecting. And at once this objection was sustained and the statement ordered stricken from the records. But, meanwhile, the members of the jury heard it. And probably the fact that it was so strenuously objected to gave it additional weight, in their estimation; at least, their verdict a few hours later was indicative of this.

Mark Twain’s classic, “The Man Who Corrupted Hadleyburg,” shows the possible misleadings of part truths. In this story the situation hinges on the completion of a sentence; that is, the *whole* truth. And the completion of that sentence changes completely the complexion of the entire situation, just as it would do frequently if permitted in the unofficial comedies on the legal stage.

In one of the recent notorious murder trials,

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the mental responsibility of the accused man was the bone of contention, medically and legally. One very impressive and important medical witness had stated definitely that the man was insane, and had given his reasons for thinking so.

A short time afterwards this same medical witness was testifying in another notorious murder trial. The cross-examining attorney, attacking this testimony, attempted to show that this witness' opinions were changeable and not reliable, by quoting some of the doctor's own statements which the attorney himself had overheard. The attorney stated that he had been in an elevator in which the noted physician was also a passenger, shortly after the trial in which the physician had given his opinion that the defendant was insane. The elevator companion of the physician was also a medical man, and they were discussing this very case. The attorney asserted he heard the physician say: "I don't know just what to think about that fellow"—referring to the accused person whom he had called insane, and showing a tendency to wavering opinion, or perhaps dishonesty, on the part of the physician.

Under cross-fire, the physician could not recall having made any such statement, although the attorney was honestly emphatic that he had done

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so. But the physician did recall riding in the elevator with a fellow physician, and remembered conversing with that physician on this very topic.

So the other physician was summoned. He remembered the conversation, recalled that his friend had made the statement to him: "I don't know just what to think about that fellow," as the attorney asserted. But also he remembered the completion of the sentence, which was this: "I don't know just what to think about that fellow, but, after all my investigations, I always arrive at the same conclusion—that he is very definitely insane."

It developed afterwards that the attorney had heard only the first part of the sentence that he revealed in court. For the doctor and his friend stepped out of the elevator at that point, completing the sentence as the two walked out through the hallway. But this was not explained until some little time later—not in time to correct the jury's impression that the witness said and thought precisely opposite from what he actually did say or think.

CHAPTER VI

THE MEDICAL EXPERT, DESPISED OF MORTALS

IN ALMOST every state of the Union efforts have been made to change our legal system of taking expert testimony. In some states they have made these attempts for a quarter of a century, and in others for twice that length of time. Yet the methods remain everywhere practically unchanged. Also, the status of the expert witness remains practically unchanged. And it isn't an enviable status, generally speaking—at least as far as the expert witnesses for the defense are concerned.

Yet, curiously enough, as a rule no such opprobrium attaches to the experts for the prosecution—the persons who “are trying to hang him,” as the man in the street expresses it. Which leads one to wonder why, in a country that shouts forever its humanity and mercy in three-inch head lines, a witness becomes unpopular even by seeming to incline toward the side of mercy.

A certain psychologist somewhat unflatteringly offers explanation. “The trend of mind of the average individual is legal rather than medical,”

he explains. "That is, most persons are much more concerned with things that pertain to behavior than those that concern health. Behavior in the pursuit of happiness is the usual and normal concomitant of existence, while sickness is abnormal and rather unusual. Wherefore, the average individual is brought in contact with these things much more frequently than with matters of disease.

"Diseases are matters for the attention of physicians; whereas, these other things concern a much larger number of persons, officers and executives and persons concerned with the general affairs of life. They are regulated by laws, lawyers and courts, with little or nothing to do with physicians. And, thus, the general trend of thought in a community is, broadly speaking, along legal rather than medical lines.

"Now, the law thinks only in terms of punishment; medicine thinks in terms of mercy. The legal idea of correcting and adjusting things is by enacting laws and more laws for administering punishment and more punishment. And so it follows that the average individual, with his naturally inclined legal attitude of mind, thinks in terms of punishment. And since the medical expert for the defense in any case is really expressing terms of mercy, and not along the lines

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of popular thinking, this expert is at once discredited in popular opinion."

Possibly this psychological explanation is correct. Certainly the statement about the public's attitude is. In proof, one need simply recall some of the notorious trials in recent years, when the question of the accused person's mentality became a matter of medicolegal controversy. The original Thaw case is, perhaps, the best example. In this case, despite the fact that the jury found the accused man insane, the group of physicians who testified to that effect were objects of adverse comment, drastic criticism and condemnation.

It made no difference that the unusually intelligent jury in the Thaw case agreed with the opinion of the defense physicians, that several courts upheld this opinion, and that Thaw himself finally demonstrated to the world that he was actually abnormal mentally in a manner that even the most captious critic could not doubt. Yet the public's attitude toward these physicians did not alter. And meanwhile, the opposing physicians, acting for the district attorney and giving opinions that everyone knows now were incorrect, came in for no criticism, either at that time or thereafter.

Which seems to confirm the wisdom of a piece

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of advice given by an old physician to a younger practitioner of medicine who was frequently called into court in insanity cases. His advice has commercial significance.

"I have noticed in my years of experience," said the old physician, "that the alienists testifying for the prosecution in these notorious murder cases—in effect testifying that the man is sane and ought to be hanged—are always well thought of by the public. At least they do not come in for the roastings of the fellows on the other side. Which suggests that the public demands its pound of flesh. So, if you wish to acquire popularity and consistent emolument, try to arrange it so that you will not be interfering with the public's appetite. Get on the side of the prosecution, when your conscience permits."

Now, although medical expert testimony is a fertile subject for legal thrusts, most attorneys have a very wholesome respect for the medical knowledge of the expert, particularly the really expert witnesses. The lawyer is not obtuse to the fact that in the six years spent in medical education leading to the degree, the doctor really learns things that the lawyer doesn't know. Wherefore, the keen witted attorney does not attempt to measure his inadequate blade in open combat with the doctor's trained rapier.

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Nevertheless, there is one element in the attorney's favor: The members of the jury are also ignorant of medical things and, unfortunately, many of them do not realize the depth of their ignorance. Take the subject of insanity, for example. The average jurymen admits total ignorance about such comparatively simple diseases as pellagra, leprosy, botulism or tuberculosis, but is perfectly willing to oppose his opinion against the best of the land in the field of mental disease. He resents, as a reflection upon his intelligence, the suggestion that "he doesn't know a crazy man when he sees one." And curiously enough, the law nurtures this opinion.

This helps the cross-examining attorney; but produces some paradoxical mental situations. Thus, there is an almost universal belief that insane persons have unusually keen and crafty intelligence. Yet, when the accused insane person displays such intelligence on the witness stand, it is regarded by most jurymen as evidence of sanity. "He is altogether too smart to be crazy," is the way the jurymen reasons it, forgetting that craft and cunning and intelligence are his own accepted evidence of insanity.

And so we have this peculiar situation confronting the attorney when an expert medical

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witness takes the stand in an insanity case. Here is a witness who knows a great deal about this particular subject, a judge and the opposing attorneys who know very much less about it, and twelve laymen jurors who know still less than the attorneys and the judge, but who, in their hearts, think they do know something about it. In addition to this ludicrous stage-setting, the situation is still more complicated by the fact that the attorney is legally permitted to attempt to show up the ignorance of the witness on a subject about which the attorney himself is very ignorant, and the jury still more so. A visitor from Mars, viewing this situation with impartial eyes, might be tempted to put a question mark after the label "Court of Justice" in such cases.

However, this situation prevails. And the cross-examining attorney takes every advantage of it. But, if he is peculiarly keen-witted and old at the legal game, he makes no attempt to attack the doctor's special knowledge directly. Some more vulnerable spot will serve quite as well, particularly if he can get the laugh on him, or arouse any suspicion about the medical witness's intelligence, integrity, moral courage, or religious proclivity—anything whatsoever. From all of which it appears that the medical expert,

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especially in insanity cases, must not only have his own subject well in hand, but should be a formidable verbal sparring master.

"Were you ever a boxer?" attorney Walsh, in the Hickman trial, asked of a veteran medical expert.

"Why do you ask?" the alienist parried.

"Because you spar like a trained boxer," Walsh explained.

ON WHICH SIDE, MAKES A DIFFERENCE

Even the side of the question on which the witness appears is prejudicial. Thus, when an expert medical witness is serving for the prosecution, his attorney often tries to make capital out of the fact that he has done so frequently before. Yet, if the same witness is serving in the cause of the defense, the prosecution attempts to convey a precisely opposite impression. That is, when the expert is on the side of the prosecution, the attorneys attempt to impress the jury with this person's importance by bringing out the fact that he has frequently served in the same capacity before.

"Let me see, Doctor," the prosecuting attorney asks, in "qualifying" the witness, "you have been called frequently by the District Attorney's office in cases similar to this, have you not?"

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The doctor modestly admits that he has.

"If I recall, Doctor," pursues the attorney, "you were a witness in the 'Hammer' murder trial, the 'Thompson' case, the notorious 'Diamond Jack' murder trial, and others, were you not?"

And again the doctor makes modest concession of the fact.

All of which, of course, to impress the jury. This man, whose testimony is about to be cast before them, is a person worth listening to. So much so, indeed, that the District Attorney—the people's representative, whose only desire is to serve those who have chosen him—places utmost confidence in this witness.

But, let this same medical witness appear in a case for the defense, one in which this same district attorney is acting as cross-examiner, and the fact that the doctor often appears as a witness is placed before the jury in an entirely different light.

"Let me see, Doctor," the attorney begins his cross-examination, "you appear in these courts pretty often as an expert witness, do you not?"

And please note that the form of this question is practically the same as the one asked by him when acting for the prosecution, but the inflection and implication are very different. The

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reason is obvious. The cross-examining attorney means to convey to the jury the impression that this man appears frequently in these courts as a witness because unscrupulous attorneys are able to hire him. Yet, in point of fact, the district attorney always "hires" this expert, and pays him well, when acting for the prosecution.

But now the shoe is on the other foot, and it is a very different foot, indeed, to the press and to the public. It is now implied criticism, not compliment.

Yet the plain fact remains that when the expert acts frequently in the cause of prosecution, no opprobrium attaches to this action; whereas, when he appears for the other side he is likely to be suspected of being a mercenary creature. This, despite the fact that the law is supposed to hold all persons innocent until proved guilty beyond reasonable doubt, and that District Attorneys are supposed to seek justice only, not persecution.

Fully aware of these things, the doctor under cross-examination, who is asked about his former appearances in court, is now on the defensive. Instead of giving the impression to the jury that he does appear frequently, he aims to convey a precisely opposite impression—seeks avenues of evading the aspersion. If he is a veteran, he has

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an assortment of evasions to offset the attorney's innuendoes, and sometimes turns things against his tormentor.

"Oh, yes," he may answer readily, "I am a County Official, and am called as a witness in such cases very frequently." Or he may gain favor in the jury's estimation by asserting that he is "frequently called by the Court to give an opinion in many cases." Of course, this isn't the sort of answer that the attorney is looking for at all—quite the reverse. But usually he lets it go at that.

Many attorneys do not attempt to bring out this point with a witness, knowing that it is a double-edged affair, and may do them more harm than good. Still, the temptation to "show up" the doctor to the jury is very alluring. And so they may go about it in a very gentle, persuasive manner. Even so, they are likely to slip into trouble. For example:

During the trial of one notorious case the cross-examining attorney, using his legal kid gloves, was eager to let the jury know of the doctor's familiarity with the courts without seeming to question his motive. His bland, suave inquiry as to whether the doctor was not in the habit of appearing in the courts pretty frequently "for me as well as against me" gave

no intimation of the joke he was secretly nursing. But the doctor, wary and on guard, parried:

"Well, yes, I am up here pretty often; but not nearly so often as I might be."

"Meaning, as I understand you," the attorney pursued, since the statement could hardly be ignored, "that you are asked more frequently to come on these cases than you accept. Do I understand you rightly?"

"Yes, that is exactly what I mean," the doctor replied; "I never appear as a witness unless I am convinced that there is very great merit in the case."

This, of course, leaves the score entirely in the doctor's favor. Instead of discrediting the witness, the cross-examiner has raised his stock in the estimation of the jurors. This doctor is not a mere hireling, but one who appears only in the cause of right, and after he has found that it *is* right.

These are the little pleasantries of legal procedure—little side plays that do not appear in the books. Some of the diabolically clever questions that have been propounded to these experts by keen-witted lawyers, and some of the adroit, disconcerting answers have been handed down through the years as medicolegal classics. And, let it be said to the credit of both the legal and

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the medical professions, that these incidents are just as frequently recounted, and just as enthusiastically received, regardless of whose particular ox may have been gored in the original contest.

However, as referred to a moment ago, the desire to discredit an expert witness is an alluring field, but, of course, the attorney is not permitted to suggest such a thing openly. That would be a fling at the solemn oath the witness has just taken to tell the truth, all of it, and nothing else, which he will presently proceed to decimate. But, by insinuation and innuendo, the lawyer attempts to do the same thing, and often he accomplishes it. Sometimes he receives an unexpected boomerang.

"Let me see" inquires the cross-examining attorney, "you come into these courts very frequently as a witness, do you not, Doctor?"—the old, threadbare, moth-riddled grandfather question of the lot.

When a certain lawyer recently asked a physician this question, he received the unexpected reply: "Yes, Mr. B——, sometimes *for* you and sometimes *against* you."

Which brought a burst of laughter from the jurors—a very definite symptom that the attorney, not the witness, was now on the defensive.

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Now, no one really likes to be laughed at, particularly when the laugh may signify the weakening of one's case with the jury. Moreover, personal feelings aside, a laugh by the jury is almost invariably a good sign in favor of the witness.

And always bear this in mind: The witness who has found favor in the eyes of the jury, and who knows it, is dangerous. The jury will exaggerate the importance of any point he may make and minimize his delinquencies, and this stimulates the fighting courage of the witness—"the courage of possession," if you please.

Thus, a laughing jury is dangerous, as is also almost any witness with a whimsical sense of humor. "Beware of an intelligent witness who grins," said an old attorney to one of his colleagues; "for a grin is not a sign of fear, and neither is it the sign of anger, and the witness who is neither afraid nor angry is at his best mentally. Scare him, and he thinks slowly. Anger him, and his judgment goes bad. But if you can't scare him or get him mad, you'd better drop him."

In the case just cited, where the answer of the witness brought a laugh, there was a sequence from quite a different angle. The lawyer's question insinuated that the witness was a

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hireling; the answer "sometimes *for* you, sometimes *against* you" revealed that, if he was a hireling, the lawyer himself was frequently his employer. Which, of course, would emphasize the mercenary side of things all around.

It happened, in point of fact, that this doctor witness had acted more frequently against the cross-examining attorney than for him. Indeed, the attorney forgot for the moment that this witness had ever acted in his behalf, except in one case. And as this case was undertaken in rather peculiar circumstances, he took up the cudgel to chastise the witness and counteract the amusement he had afforded the jury.

Now, it is a well established rule among gamblers that when the cards are "running against you," they continue to do so for some time, and *vice versa*. The cards show a similar persistent perversity in the legal gambling game. But lawyers, like gamblers, always hope that things will soon take the inevitable change for the better. Hence the following up of a certain line of attack, once it is established.

"Now, as a matter of fact, Doctor," this attorney pursued, "you have never represented me in any case but one, and that several years ago."

But the doctor's reply that he had, and his

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description of other cases that apparently the attorney had forgotten, did not improve matters for the cross-examiner.

"I don't recall those cases," he parried: "but let me ask you if this only case that I remember did occur in the following way: I had asked Dr. Shepherd to represent me in this case. But as he was out of town at the hearing, he could not act. Also it was vacation time for most of the doctors, and so I finally asked you to act in Dr. Shepherd's place. Is that not the fact, Doctor?"

In other words, the lawyer couldn't get the really desirable physician, Dr. Shepherd, or some of the other desirable doctors, because of vacation time, and so he was obliged to take what he could get—the witness in question. That was the implication. Things were brightening up for the attorney.

But it was only a flash: the cards were still "running bad." For the doctor, still in good humor, replied, with an infectious twinkle: "Yes, you have mentioned some of the facts, but left out some of the essentials, Mr. Osborne. The circumstances were these: You had asked Dr. Shepherd, who is one of the greatest physicians in the country, to act in this case; but he was unable to do so. Then, since you could not get the greater physician, you requested him to

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designate the second greatest. And Dr. Shepherd named me."

And the ripple of laughter from the jury box showed that, whatever the jurors' shortcomings in the field of legal technicalities, they were still appreciative of humor.

CHAPTER VII

MANICURING THE MEDICAL EXPERTS

THE Arthur Burch case, out in California, gave the public, the press, and court officials, an unusual chance to even up scores with the medical experts to trim them down to satisfactory dimensions. In this case every physician who suggested officially that the accused man was not exactly right mentally was flayed verbally and in print. One of the local newspapers suggested that such men were a "disgrace to the medical profession and should be kicked out of it." Yet the crime which the doctors for the defense committed was simply to recommend that Burch be examined by the official Lunacy Commission.

A sixth physician, an alienist of high standing, who examined Burch for the prosecution presumably to find the prisoner sane, but who found marked evidences of insanity, was a target for special criticism by the presiding judge. It is the privilege of any judge to "roast" whom he pleases without danger of a return.

All this happened previous to the actual trial of the accused man—when, according to that

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little legal pleasantries, Burch "was presumed to be innocent." And now that the heat of conflict has subsided, Burch is at liberty and at large, as is also his alleged accomplice, Madeline Obenchain; and her ex-husband, who figured so conspicuously as the "man in a million," is again married—now that these things have transpired and tranquilized, the contemplation of the public's attitude at that time makes an interesting psychological study. Also there are some interesting side-lights that are no longer "professional secrets."

First of all, please note that nobody, except the opposing attorneys, ever offered a word of criticism for the group of alienists who acted for the prosecution in attempting to hang the accused. And even Burch himself feels more kindly toward them than the ones whose testimony saved his neck. He preferred the rope to an asylum—as is usual in cases of mental aberration.

The inside story of this notorious case may be summarized as follows: Burch was accused of lying in wait and killing Belton Kennedy with a shot-gun, the victim having been lured to the place where he met his death by Mrs. Madeline Obenchain, whom Kennedy had declined to marry. There was no direct evidence. But

circumstantial evidence pointed to Burch, who was arrested while on his way from California to Chicago.

The principal defense attorneys were the very keen-witted Paul Schenck of Los Angeles, and a fighting colleague, John L. Sullivan, of Seattle.

Now it happened that until the evening before the day set for the trial, neither Schenck nor Sullivan had ever seen or conversed with young Burch. Yet, strange to say, when they called upon the prisoner that evening to get the very vital evidence which he alone could give, they found the young man in a garrulous but entirely uncommunicative frame of mind—unlike any other accused man they had ever seen on the eve of trial. Thus, when they asked Burch concerning his whereabouts on the night of the murder, and inquired the names of some of the witnesses who could confirm his statements, the attorneys were politely and smilingly, but firmly, informed by the young man: "That is for you fellows to find out. That's what I hire you for."

When reminded that such sort of flippancy was very likely to slip a noose about his neck, Burch simply smiled and kept on with his bantering. He refused to take the situation, or anything else, seriously.

Baffled at every turn, the lawyers finally

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returned to their offices to talk things over. All of them had had long experience with accused criminals, but none of them had ever seen a sane man act in this manner. Here, at the eleventh hour, with the beginning of the trial scheduled for the following morning, they faced the situation of having no material for the defense. Their client simply refused to co-operate with them in any manner.

While they were pondering this perplexing situation, a lawyer friend dropped in. That very afternoon this lawyer had consulted two of the foremost alienists in the city in regard to another case and had heard some opinions expressed about the Burch case. Both of these alienists mentioned the fact that they each had individually and separately observed Burch, and believed him to be insane. They mentioned that a third alienist of their acquaintance had also, independently, reached the same conclusion.

Now, in California, the law provides that if at any time an accused person shows sufficient evidence of mental abnormality to arouse a reasonable doubt in the mind of the presiding judge, this judge must make official inquiry into the matter. If sufficient evidence is forthcoming, he will then order a further investigation of the accused person's mental condition.

Such proceedings are, of course, unpopular with the courts, the newspapers, and the populace at large. They deprive the newspapers of "copy;" and the general public of "scare heads" and sensational newspaper thrills. For there is scant copy in a case that is brought quietly and unobtrusively before the Insanity Commission. Moreover, most persons consider that in criminal cases insanity is a "fake" and a "dodge" rather than a disease. Indeed, it has never been possible to entirely rid the public of the ancient idea that this "insanity business" is largely a "possession by demons," just as in Biblical times. The impression still lingers, even if not actually believed. Wherefore, the skillful lawyer hesitates to use the plea of insanity as a defense unless forced to do so.

In this Burch case there seemed to be no alternative. The eleventh hour had struck and no other evidence was available. Moreover, the attorneys were convinced that the young man was, for the moment at least, mentally deranged. And so, at nine o'clock in the evening, just thirteen hours before the time set for trial, Schenck started his quest for the three or four alienists who had expressed an opinion.

One was at the Beach; another in a suburb; a third entertaining friends at a theatre. But

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by eleven o'clock the attorney had rounded them all up for a consultation in his suite of offices. Meanwhile, he had secured an especially intelligent ex-court stenographer, so that, by midnight, the machinery was ready for taking and making depositions.

And at exactly 9:45 the following morning—just fifteen minutes before court convened—the last word had been written by the stenographer, the last signature indited before the notary, and the attorneys ready to hurry the papers into the court-room a few blocks away.

The story of the bombshell effect of presenting this evidence to the court with the request that Burch's sanity be inquired into, is past history. Most persons thought it a long-planned, adroit, legal "trick." Yet it was all conceived and spontaneously executed within fourteen hours before the opening of the trial.

Now, in legal practice of keen-witted attorneys, the insanity defense is a last resort—frequently a forlorn hope—even in obvious cases. For one thing, such defense is a virtual admission of the guilt of the accused. Moreover, there is a kind of unwritten sentiment among attorneys minimizing the legal skill required to win such a case—comparable to a pugilist winning by "decision," not by a knockout.

However, this was not hinted at in the case of Schenck and his associates. Their legal status was too well established. Circumstances, and their own opinions of Burch's mental condition were determinative.

All they were asking was that Burch be examined by the official Lunacy Commission of trained physicians instead of twelve laymen. But they didn't get it, simply the doubtful privilege of having the case "put over" for a few days.

During the intervening period, two other prominent alienists volunteered the opinion that the prisoner was insane. And, meanwhile, the District Attorney garnered three or four alienists in opposition.

But it developed that the oldest and most experienced of these three alienists, after making his examination, reported the prisoner insane and so testified. Said testimony causing the unfavorable criticism from the Bench referred to a moment ago. So at the second hearing, six alienists—five produced by the defense, and one by the prosecution—testified that the prisoner showed sufficient signs of mental abnormality to justify his examination by the Insanity Commission; while two alienists, and quite a flock of jail guards and jail-birds, testified that he didn't.

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And meanwhile the multitude outside the court room clamored for its pound of flesh. The newspapers proclaimed the clamor, which may not have been entirely unheeded by the Judge in reaching his decision that the testimony of two alienists *plus* the prisoner's jail associates, more than offset the testimony of six alienists and others who were not jail residents.

Possibly another element entered into and influenced the Judge's decision. He had, at one time acted as the presiding judge in the Insanity Court and, in this capacity, had acquired a considerable knowledge of insanity, perhaps as much knowledge as any intelligent layman can acquire. But insanity is a complex disease, the most difficult of all diseases to understand; so much so that even a regular medical education simply lays foundation knowledge for special study of this condition. The amount of knowledge about it that any layman can acquire, even from the Bench, is limited. And, as Pope pointed out, a little knowledge is a dangerous thing.

Be that as it may, as a result of this judicial refusal to have Burch's mental condition inquired into by the official Insanity Commission, there followed three trials, with the luxurious setting of something like a quarter of a million dollars'

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cost and much paper and printers' ink. All three of these trials misfired. In the first one, two of the jurors thought that the prisoner was insane. The other two trials were indecisive, because a certain number of the jurors thought that the prisoner was innocent, regardless of the condition of his mind. So, in the end, something like a year later, the net result was summarized in the statement that the friends of the accused and the county were much depleted financially, and the reputations of the experts for the defense considerably lacerated. Otherwise the case stood precisely where it was at the start, and the prisoner was still in jail.

This was only the end of the third reel, however; there was still another to come, and, curiously enough, this last reel was filmed in the lunacy court—the very setting requested in the beginning by the attorneys acting for the defense. Moreover, it was at the demand of these same attorneys that this reel was run off at all, as Burch had been declared a free American citizen. Paul Schenck's belief in Burch's mental abnormality was not merely a court-room ruse. He really believed it.

So, also, did all the alienists of the official Insanity Commission, none of whom had been connected with the case before, and who acted

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independently of either prosecuting or defense attorneys. They believed it emphatically, and said so.

But the presiding judge thought otherwise officially, although he had expressed an opposite opinion to one of the defense alienists, unofficially. Or perhaps he was influenced by some deep legal technicality, quite incomprehensible to mere lay minds. And, since in California, the medical members of the Insanity Board, although in the majority numerically, have no real voice in deciding medical matters, Burch was declared officially sane by the judge, and against the recommendation of his medical "advisers."

THE LEGAL YARD-STICK

Brevity is the soul of wit; but not in law. Quite the reverse. In law they measure quality with a time yard-stick—"legal yardage," someone has called it. Merely to speak of it as verbosity or prolixity is not to do it justice at all. In legal procedure the man who talks two hours is twice as good as the man that talks only one. Measured with this standard, Abraham Lincoln's Gettysburg masterpiece would be an unqualified fizzle.

Thus, in the trial of Asa Keyes, Los Angeles' one-time District Attorney, it was pointed out

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and urged by the prosecuting attorney that Keyes had not really tried to convict certain alleged guilty parties, "because he had only addressed the jury for two hours." To the legal mind this indicated that the attorney was not very much interested in the case. Two hours: time enough for even a slow talker to pile up more words than have been used in describing most of the epoch-making discoveries in the world's history. Yet the prosecuting attorney seriously contended Keyes was not trying to convict because he didn't talk longer.

Later, Keyes, himself on trial, addressed a jury in his own behalf. He talked only an hour and a half. Which, measured by the legal yard-stick, proved for a certainty that he was not interested—not interested in what was practically his own life-and-death affair!

THE INSANITY EXPERT'S BLUFF

There can be no doubt that the expert alienist on the witness stand often does things that discredit him in the minds of the laymen. Yet he does them for precisely the opposite purpose.

One of these things, which was peculiarly exemplified in the Hickman case, was the question as to just when in the course of his examination the doctor reached the conclusion that

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Hickman was not insane. One doctor, for example, who had examined Hickman hour after hour, and who testified "hours without end" as somebody expressed it, when pressed by the cross-examiner, declared that he had not made up his mind that the young man was not insane until about the close of the last hour of the examination.

Naturally, this was said for the purpose of impressing the jury with the great care and deliberation exercised in making the examination and arriving at this momentous conclusion. But, consider for a moment the possible effect of such a prolonged period of indecision. "If it really takes an expert that many hours to determine whether or not a man is insane," a member of the press staff said to me, "it seems to me that something is wrong somewhere. You fellows claim that insanity is a real disease and that your methods of determining it are scientific and practically on a level with the diagnostic methods of other branches of the profession. Yet if the surgeon or general practitioner were to take that length of time to decide anything, the patient would be dead and buried. What about it?"

"Moreover, if it really requires that length of time for a physician to determine a thing, it

looks to me as if he really isn't much of an expert. Almost anybody could find out the fact if they hammered away on it hour after hour and day after day."

As a matter of fact, what this press representative really believed, and what I believe to be the fact, is that the expert did not really require any such length of time to determine the man's mental state. After a very few minutes, unless in very exceptional cases, the real expert reaches his conclusion. And although he may spend hours and days thereafter in this examination, such time spent is for confirmation of his opinion, not for reaching the conclusion itself. And, judged by its effect upon the spectators and probably the jury, I believe it would be far better if the doctor were to make this statement—to say that in a very short time and for certain reasons he came to the conclusion that the man was or was not insane and that his prolonged examination was simply confirmatory.

Of course, one must keep in mind the importance of the "yard-stick" in legal measure. But certainly some of the lay observers cannot help but draw the conclusion that psychiatry is a very rudimentary, inaccurate, and inexact department of medicine when it takes such a long time to determine anything.

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As a matter of fact, there are many forms of insanity that may be diagnosed with accuracy in less time than it takes to write these words. Certain cases of dementia praecox, for example—a young girl, standing in her room with hand raised in a fixed posture, eyes closed, whispering to herself—one glance at this patient takes in the cardinal points and enables any expert to make a diagnosis. In such a case if one spent hours in the examination, and more hours on the witness stand explaining it, he would lay himself open to the inquiry as to why he required so much time to determine so obvious a thing—if he is, indeed, really expert.

However, there is no denying that the physician must spend a considerable length of time in his examination, regardless of how quickly his opinion is formed. This, for precautionary rather than scientific reasons. Otherwise, the clever lawyer may be able to make the jury suspect that the doctor is careless or inefficient.

In this respect the alienist expert seems peculiarly vulnerable—in public opinion. One does not criticize or doubt the diamond expert who glances at a precious stone and gives an expert opinion. Indeed, the man wouldn't be considered much of an expert if he couldn't do that very thing. Also, as pointed out a moment

ago, there are many medical cases that can be passed upon with the same speed. But the layman doesn't know this, will not believe it; and the doctor must be governed accordingly. He must "play the gallery."

"Do you mean to say," a clever attorney asked the witness who had given damaging testimony about the mental state of a patient, "do you mean to say that a man may be insane and mingle with people and go about his business in the ordinary way and that most people would not know it?"

The doctor asserted that such was the case.

"Well now, Doctor, do you mean to imply that any one of the men seated at this table"—he indicated the long tables at which something like ten attorneys were seated—"do you mean to say that one of these men here might be mentally deranged and we not know it?"

The doctor seized this golden opportunity. "Yes, indeed; not only *might* be, but for all I know. . . ."

That was as far as he needed to go. The audience and jury enjoyed the apparent slip. And even the judge, the Hon. Paul J. McCormick, who has a sense of humor, suggested:

"I trust, Doctor, that you do not include the Court in this category."

CHAPTER VIII

THE EXPERT AND HIS HIRE

SOMEONE has said that if all the laws existent in America (roughly 200,000) could be gathered together in one place it would constitute the greatest comic library in existence. If illustrated, even indifferently, it would put LIFE and JUDGE out of business and shatter the salaries of the comic strip artists.

One would like to think, of course, that the laws were made by serious-minded people for serious and helpful purposes. But after observing how they work and the way certain lawyers work them, one is rather inclined to think that the cartoonists themselves had a hand in their making. Anyhow, some of them seem like mendaciously applied caricatures.

It appears that when they are a little short of sensational items, the newspapers and people at large take pot shots at the "experts," that is, the alienists or experts in mental and nervous diseases. Not the experts testifying for the prosecution—attempting to hang the man, you understand—but the defense experts. And they do this because they take it for granted that these

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men are simply hired, are paid enormous wages, and testify to anything that is requested of them by their employers, the lawyers.

I suspect it would come as a shock to a great many persons, also to most physicians, to learn some of the facts about the actual fees paid to the average defense alienist, and who pays him—or rather, who *doesn't*, a good share of the time.

One would suppose naturally, and most physicians do suppose, that when a lawyer engages an expert to examine a man and testify for him—stipulates the size of the fee and makes all the arrangements—that this same lawyer is more or less responsible for the payment of the physician. That it is his duty, legally as well as morally, to see that his expert is paid. That is the general supposition. Nothing is farther from the fact. The lawyers have seen to it that the laws governing these things are “right,” that is, entirely in their own favor. Not the lawyer, but his client, is responsible for the pay of the expert witness. And there are many, many dead-beats among that class of clients.

WHAT IS AN “AUTHORITY”

The term “authority” is somewhat flexible, legally speaking, and dangerous. Dangerous at

least to the witness who permits himself to be wheedled into acknowledging that there is any such thing whatsoever.

Medical cases lend themselves peculiarly to this sort of thing. Medicine is not an exact science. Which is simply another way of saying that the tremendous mass of precise medical knowledge is tintured with inexact opinion. Not only opinions about general subjects, but personal opinions. Hence the term "authority" as applied to the work of a medical author means simply that his printed opinion has the stamp of approval of most medical men.

Even so, the most authentic books dealing with medical subjects will contain many slipshod statements, which really express opinions of the author, in contrast to the precise statements of books dealing with exact scientific subjects. That is, treatises on chemistry, or astronomy, or physics, are fundamentally exactly alike in their statements. While medical authors cannot deal so precisely, since their subject is not an exact one. And this is likely to lead to the discomfiture of the medical witness unless he is thoroughly oriented in legal wiles and technical pitfalls.

Thus, "authority" is a loose term in medicine, an exact one in law. At least, an adroit lawyer

may make it appear so to the jury. For, by carefully picking and selecting from any exhaustive medical treatise, one may find many apparently contradictory statements. Indeed, medical treatises, like the Bible, "will prove most anything," if skillfully and improperly interpreted. So the expert witness on a case finds himself in an anomalous position of being endangered by the very books that he uses for the basis of his knowledge. This, because he falls into the habit of using the term "authority" carelessly, while the cross-examining attorney doesn't.

"You accept Agnew as an authority in surgery, do you not, Doctor?" the cross-examining attorney asks the honest young surgeon who has just testified that under such and such circumstances operative measures are necessary, as in the case under consideration. The young surgeon knows that Agnew is an "authority" in the medical world. So it is perfectly natural for him to make the suicidal error of admitting it.

Immediately, the cross-examining ogre, taking up Vol. IV of Agnew's great work and turning to page 361, forthwith reads to the young surgeon an opinion about a case that seems to contradict absolutely the young surgeon's statement, and his attitude.

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And yet the surgeon may be absolutely right in this particular case. Furthermore, when properly interpreted, Agnew himself would confirm this. But the physician, having admitted this writer as an "authority," a statement which he cannot rescind without discrediting himself, now finds himself opposing a contradictory statement which in all probability he will not be permitted to explain satisfactorily. It is entirely on a par with the cantankerous, agnostically-minded individual who is forever digging out apparent contradictions in the Bible. And while it does not fool or deceive His Honor on the Bench it may have a very different effect upon the members of the jury.

Wherefore, skillful expert medical witnesses find ways of avoiding this pitfall. Which is perhaps best illustrated by the classical case that occurred in Chicago a few years ago.

A Chicago surgeon, of international reputation, was being cross-examined by a very skillful attorney. "You recognize Agnew as an authority, do you not, Doctor?" the lawyer inquired.

"No, Sir," was the curt reply.

The lawyer paused, raised his eyebrows in surprise. Then he hunted up another well-known writer on surgery and repeated his ques-

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tion to the witness about this book. He received the same negative reply. And this answer was repeated to each and every one of the questions about "authorities" submitted.

"Will you please tell me, then, Doctor, whom you *do* consider an authority in this matter?" the attorney shot at the evasive witness.

"*I* am—in this particular case, at least. I examined this case and I know about it, while these other 'authorities' you mention are speaking of other cases and in generalities. No two cases are ever precisely alike, and the surgeon who personally examines and studies a case is a better 'authority' than any surgeon who is writing about cases in general."

THE "DEPOSITION"

The deposition of a witness, taken sometime before the trial itself comes off, impresses the doctor and almost anyone who has not lapsed into a state of feeble-mindedness, as being ultra foolishness. But it isn't so from a legal standpoint, because frequently it gives the attorney ammunition, not in the cause of justice, but in the cause of the welfare of his case—which is often not synonymous at all.

This deposition thing is a sort of preliminary inquisition, performed in the presence of a notary

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and in the presence of the deponent's own lawyer and that of the opposition. It is done at the request of the opposition, and the witness is supposed to give the testimony that he is intending to give before the court. And thereby he furnishes a nice assortment of ammunition for the opposing attorney to use against him when, several months later, or several years, he goes on the witness stand to retell his story.

To casual observation, this is the only excuse for taking such depositions—although, of course, a good attorney can give you a dozen reasons and use up two or three volumes in doing it. For everybody knows that no person—the most honest person that ever lived—can relate the same thing twice in the same way. And a clever attorney, with the typewritten “deposition” before him, can frequently cast discredit upon the witness's testimony by using this document.

“Did you not say at such and such a time and at such and such a place that so and so was the case?” The inquisitorial attorney asks, holding the typewritten document before him. And when the doctor jogging his memory, admits that probably he did say that, the lawyer casts his reflection by reference to the typewritten pages of alleged authenticity.

But there's a fly in this delectable legal oint-

ment if one only knows how to find it. Bear this in mind; even the most skilled reporter cannot record verbatim what you say; he makes mistakes in his stenography and in the transcription, especially when the witness talks rapidly and uses technical terms. There is not a perfect typewritten document of any length in existence. And so, if the doctor wishes to protect himself against the nasty type of attorney, who attempts to warp the truth by reflection, he can do so frequently by pointing out these fallibilities of pot-hooks and transcriptions, by admitting that he said so and so only "in substance."

He has the right, and he should use it, to explain fully the differences between his alleged former statement and the ones just made, discrepancies that will not be of any very great consequence. Moreover, he may inspect the typewritten document, and should always do so, before answering any important question. Thus, frequently he will be able to detect mistakes in the typography of many pages—trivial mistakes, probably—but sufficient to discredit the whole document. Sometimes, also, the attorney does not read the manuscript accurately, may stumble on technical words, or even leave out such trivial words as "probably," or "may"—

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words that change the entire complexion of the sentence.

This savors somewhat of trickery. But the whole process of legal procedure is a game; and while it is not ethical to use the word "trickery," it is a good dictionary word and accurately descriptive—even if one simply uses it as a mental reservation.

LEGAL "DELIBERATIONS"

They speak of court procedure as "deliberations," and that is surely accurate. If big business, or little, for that matter, were to adopt similar tactics about equally trivial affairs, it would wind up in the poor farm—this whole country would be one vast poor farm. The lawyers talk volubly about "speeding up court procedure"; and meanwhile they stick to the same old general line of bunk, burning up time, apparently mostly for the purpose of making "records," legal and newspaper. "And then," as one attorney says, "there are our clients; they must get a run for their money, must they not?"

And yet, with all this plethora of words it often happens that the actual opinion of those qualified to have one, never gets into the records at all. For example, in the Hickman case, the

majority of the newspaper men, at least the majority that I talked with, had the "low down" opinion that the young murderer was probably a case of dementia praecox. Yet no such opinion was expressed by them in the newspapers they represented. Possibly they put it in their "copy," but if so it was "blue pencilled" before it ever left the editorial desk. This occurred in several instances in the "hammer murderess case," in which many of the reporters thought a clear case of epileptic insanity had been established. The public wishes to know the whole truth; and sometimes it gets it when the editors happen to feel the same way about the situation.

It is the knowledge of this policy that makes the sophisticated look askance at the things he sees in newspaper print about court cases. Instinctively he feels that he is not getting "the truth, the whole truth, and nothing but the truth" in the press reports any more than in law. Yet, curiously enough, credulous creatures that we are, we believe almost everything that we read. We just can't help it. "If it stands on the paper it must be so," as one of Myra Kelly's little Yiddish "citizens" expressed it. And yet the newspapers are the greatest "educational" factors in our country today.

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A LETTER TO THE COURT

"How much are you being paid for testifying in this case?" is the inevitable question asked the expert witness by a certain type of attorney.

"A good big fee," one veteran physician replied, "probably one-tenth as much as you will get for the same length of service."

The physician is frequently called upon to give a letter or certificate stating that the condition of a certain patient is such that it would be dangerous for him to appear in court. In most instances the letter is given in entire sincerity. But the lawyer of the opposition seldom thinks so. He suspects that the doctor's opinion has been "bought," as usual, unable to divorce medical from legal ethics.

Now, as a matter of self protection, a doctor in these cases, particularly criminal cases, exercises special caution in making his examination and preparing his report. He must be specific, should give objective, clinical, and demonstrable reasons for his opinion, and be ready to back it up. For, in any important case, he will be called upon to do so. "A scrap of paper" pretty accurately describes the doctor's letter when it gets into court.

A short time ago one of these documents was presented by the defense attorney in a criminal

case in which obviously a delay in proceedings was sought. The letter in question came from a physician who stated that he had been called the day before to see the patient who was suffering from an acute "gastrointestinal condition, from which he had suffered on various occasions before." It concluded with the indefinite statement that, "the patient would be able to appear in court for trial in the matter of three weeks."

Now, it is possible that certain judges would have accepted this document. Yet the doctor had not stated his opinion definitely that the man was unable to appear in court. Had he done so, it is more than likely that the judge would have accepted the medical man's opinion. But such equivocation suggested either honest ignorance or dishonest evasion.

"This letter says nothing definite," the judge commented, "either bring the defendant or the doctor into court."

The doctor came a few hours later and the judge questioned him. It was evident that he was the entirely honest type of "family doctor." Also, that he had no great experience with courts or with criminals. He admitted frankly that his opinion was based largely upon subjective symptoms—upon the statements of the patient's friends and relatives and of the patient himself.

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True, there was very little physical evidence of illness—no temperature, low or high blood pressure, no heart or lung difficulties. Yet the man was in bed and appeared sick; and, in his practice, the patients who sent for him *were* sick, even though their symptoms were objectively vague.

The judge, shrewd but kindly, also the member of a family of physicians, brought the frank admission from the physician that the patient *might* be malingering, although he had had little experience with this class. But he did not wish to do an injustice to a possible sick person.

This illustrates the sort of thing that often confronts the doctor. The friends of this malingering patient had sent for the physician as though calling him in the ordinary routine way of summoning a physician, and asked him to examine and prescribe for the patient. They described definite symptoms. The patient, in bed, gave the impression of a man who was ill, and related symptoms which confirmed the statements of his friends. No mention was made of the fact that there was a criminal charge; and when the doctor was asked "if he would mind giving a note stating the patient's condition," he had no suspicion that he was abetting a felon.

Lawyers, constantly dealing with law-breakers,

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find it difficult to understand such situations. Doctors, who are constantly seeing really sick persons who have no very definite symptoms, and who seldom see criminals, can.

But, when there is any ground for suspicion, the doctor should always give himself the benefit of the doubt, regardless of the consequences to the patient, the public, or the law. If he cannot definitely establish the fact that the patient has a pathological state that can be demonstrated, the physician should protect himself by saying so. He will get no credit by seeming to try to help the undeserving.

CHAPTER IX

MENTAL QUIRKS OF JURIES ON MEDICAL SUBJECTS

EVERYONE knows that the jury system is the bulwark of our liberty. The meaning of the word "liberty" seems to have been somewhat jostled about in the political events of recent years, but the "bulwark" still persists.

Veteran attorneys hesitate to forecast the possible action of a jury in any civil or criminal case, whatever the evidence. Which suggests the vagaries of juratorial action. But this does not apply when the question of insanity is involved. Here the average jury becomes dependable to the nth degree. An ordinary lay jury, passing judgment on an alleged insane person's mental state, may be depended upon to reach some amazing conclusions.

To be sure, certain judges in some cases that are nationally notorious, seem to rival the jurymen's mental obliquity. But even here public opinion interprets results very differently: it is the intelligence rather than the integrity of the jury that is open to suspicion.

Of course, medical men have contended for

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something like a century that juries of laymen should not be permitted to pass judgment on the disease, insanity, any more than they should diagnose such much less obscure conditions as smallpox, appendicitis, and botulism. But they are so permitted in every state. And about the only relieving feature of this farcical arrangement is that the result, although sometimes tragic, is far more likely to furnish copy for the "funny sheet" than the editorial page.

A case in point is that of a world war veteran, whose mental condition had made him the ward of the Government for several years. He first drew the spotlight by claiming that he was the author of some of Harold Lloyd's plays. He claimed many other even more absurd impossibilities, but the Lloyd incident was the one that touched off the fireworks.

One of the penalties of fame, of course, is that it is the magnet for attracting crack-brained cranks. Even the fun-making movie star is not exempt. But when the thing has progressed to a point where a good-looking young man like the young ex-soldier, a total stranger, forces his presence upon the comedian's household at unexpected hours, claiming acquaintance with the members of the family; also declaring that he has written one of the star's "best sellers" (which

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the star distinctly remembered having written himself), and then proceeds to camp out in the fun-maker's back alley every night—when this sort of thing occurs, there is a reasonable excuse for suspecting that the young man is either drunk or crazy.

That is merely a medical opinion, however. Juries often think otherwise. Indeed, a jury did think otherwise in this particular instance; and that, after hearing an amazing story from the defendant's own lips, about the most rational part of which was the Harold Lloyd incident.

Among other things, this ex-soldier stated that he was in Alaska talking with Robert W. Service at the time of the shooting of Dan McGrew. Indeed, he helped Service write the story; or, to be exact, he planned the story and Service helped him write it, or something like that.

All of which, although wholly improbable, was possible. Not so his next statement, to the effect that when he was seven years old, and the pugilist, Packy MacFarland was twenty-one, he knocked out Packy in a fair fight. Packy MacFarland was one of the cleverest and hardest fighting boxers of his time.

"And do you know, of your own knowledge, Doctor, that he did *not* knock out Packy MacFarland?" the cross-examining attorney asked one

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of the physicians who had commented adversely on the credibility of such a statement. "Of your own knowledge" is one of the keystones of legal practice.

"Well, of course, I wasn't there," the physician parried, "but anyone with even a modicum of commonsense would know—" But this answer was promptly objected to and stricken out. No witness has a legal right to try to inject any commonsense into such a situation.

Even the defendant did not attempt this. On the witness stand, he assured the jury that he did actually knock out this wonderful pugilist who was twenty-one, while the defendant was only seven years of age. And, most amazing, the jury failed to see anything unlikely about the statement, or with the mental condition of the man making it. Commonsense was not prevalent that day. And presently, almost without hesitation, the jury pronounced the young man entirely sane, and he and his delusions were turned loose upon the community. Naturally, a few months later the inevitable happened: The young ex-veteran was returned to jail, not as a sick man, but on a felony charge.

"Ah, well," as some one observed after the trial, "there is something, after all, in that clause about 'a jury of one's peers,' I see."

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However, despite the ludicrousness of this jury's verdict, the spectre of tragedy always stalks in such cases. Indeed, from one angle, this element is present in every insanity trial. But there are degrees. And when the patient is cheerful and happy about the affair, as frequently he is, one may be excused for indulging the less serious element.

The case of J. Bertram Clark is one in point. Bertram, fair, fat, and forty-six, was, among other things, an alleged minister of the gospel. He had been in the limelight many times, for better or for worse, but his final appearance was the result of a slight difference in viewpoints between himself and the majesty of the law. To be explicit, he claimed that, being a minister, he had a perfect right to marry himself to somebody, which he did.

The "somebody" in question was a minor; also she was a detective. Which resulted in Bertram taking a ride to jail in the black wagon.

When Bertram's record was scanned by the authorities, and made public by the news-gatherers, the suspicion was aroused that Bertram had something amiss in his upper story. Also, there was a suspicion that some members of the gentler sex, many in number and of assorted ages who had "fallen" for this Divine representative, must also have something very

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tottery in their mental mechanisms. For, whatever his other engaging qualities, Bertram was no Beau Brummel.

He was, indeed, rather stout, and somewhat bald, blind in one eye and completely deaf. At least, he claimed complete deafness to mundane sounds, although he could hear messages from the spiritual world regularly and interpret them graphically. However, there was a question about the actual state of his hearing, despite the fact that it was impossible to trip him into consciousness even by unexpected explosions close at hand, and the usual forms of malingerer tests. Yet, on occasion, he would apparently hear things said in a moderate tone of voice, when there was no other way of his receiving the message. So that the suspicion persisted that part of his deafness, at least, was assumed—was, in fact, an insane pose.

Be that as it may, there was no mystery about many events in Bertram's career. He admitted, for example, that he was an inventor, a detective, a psychic, and a spiritualist. As an inventor he created a "balance," which had earned him the reward of a ten-year sentence in a Colorado penitentiary. Following the completion of this sojourn in the State's care, he "heard the voice of the Inner Silence for twenty minutes on the

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twelfth day of the twelfth month," an event that was preceded by his ordination as a spiritualistic minister.

His general attitude toward himself was that of complete satisfaction. Indeed, he was so content with himself and his accomplishments, that he was always happy, regardless of his surroundings. While awaiting trial he was sustained by the fact that the Government was sure to purchase his most recent invention, an automatic mail-sorter, and pay him a million dollars cash for it. This was merely an aside in his activities. His greater function was that of a healer, his specialty in the healing line being that of preventing people from becoming insane. He claimed to have made no less than forty thousand such preventions.

By the aid of Divine power he had discovered a novel alphabet with which he was to produce a new language. Meanwhile, the interpretation of the older languages claimed some of his odd moments.

He asserted that the Jews had invented the English language. And since the Jews write their language backwards, many correct interpretations of English could be made by spelling the words of our language backwards. And he certainly offered some very effective examples.

Thus, when the late William Jennings Bryan,

the Great Commoner, was ladling out his weird interpretation of evolution, Bertram was drawn into his maelstrom to match sophistries with him. His method of interpretation was much simpler than Mr. Bryan's. Simply spell the word backwards, Hebrew fashion, and you have the correct answer: evolution—"no it U love." Bertram himself understood the interpretation perfectly. But he said that most Americans were not ready for this information; and neither was Mr. Bryan. At least, he inferred so, from the fact that the Great Commoner would not voice his acceptance of Bertram's interpretation by replying to the communication mailed him by this backwards interpreter.

Indeed, Bertram's attitude toward the generality of people in this world was one of condescension and pity rather than of resentment. He seemed to harbor very little grudge against the officers of the law, although on numerous occasions some of them had yanked him about considerably. But there was just a trace of resentment against members of the legal and medical fraternities, largely because they had questioned his mental stability rather than his honesty.

Bertram, like many other persons, preferred being called criminal to crazy. And so he took mild tribute from the lawyers and doctors by

explaining, backwardly speaking, what their names really imply. Thus, the word "lawyer," when spelled backwards and with one letter inverted, becomes "rey mal," which means "bad king." Meaning, still further, that the lawyers have power and abuse it.

"Doctor," when spelled backwards, becomes "rot cod," which seems to have no special significance until interpreted by Bertram. "Rot cod," he explained, is merely another way of saying, "poor fish"—the category into which Bertram relegated all medical men who had passed adversely upon his mental condition.

Had Bertram stopped his interpretations at this point before a jury, it is quite possible that the verdict rendered might have been different. But he had other and less convincing evidence to present. He stated, for example, that he had actual visual memory of three former incarnations. In one of these he was frozen in the ice, and remembers distinctly having to dig about in the ice to obtain food. And this food was, of course, entirely vegetable in character, since his religion did not permit him to eat animal food of any kind.

Meat of any kind produces fear; whereas, persons on a strictly vegetarian diet cannot experience the sensation of fear. Such persons may

enter the den of wild animals without fear of injury, whereas a meat eating person would be quickly torn to pieces. Possibly this explains the Prophet Daniel's immunity, he suggested, and, exemplifying the workings of this theory, Bertram stated that he himself felt not the slightest trace of fear in the courtroom, even though surrounded by such an array of legal and medical talent. His circumstance, he thought, was comparable to that of the Prophet.

Even these vagaries may not have penetrated the juratorial perception, had not Bertram skidded a little into blasphemy. He declared that G-o-d was really d-o-g spelled backwards. Which convinced the jury of sufficient mental wavering, so that Bertram is now a permanent resident in a hospital which cares for the welfare of such unfortunates. Yet, as sometimes happens in the trial of insanity cases—serious life tragedies—an element of humor prevails. It was true in this case. The jurors and spectators were smiling broadly or laughing outright a good part of the time, and Bertram laughed with them.

It is this imagined disagreeable phase of insanity that makes it so repellent to most persons, and accounts for the universal misunderstanding about the condition. Even the law itself holds opinions so different from the opinions of the

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medical men who are most competent to judge such things, that there are few points of contact in the matter between medical and legal minds.

As illustrating the entirely erroneous conception most persons have of insanity, is the mistaken idea that insane persons are peculiarly unhappy individuals. The idea seems the result of false deduction. Insanity produces most unhappy effects upon the friends and relatives of the patients; wherefore, the very natural deduction that the patient himself must be unhappy. But this is where logic is misleading. In point of fact, a very high percentage of insane persons are not unhappy at all, but precisely the reverse. It is probable that no outside community of corresponding size has a higher average of happiness than that of the residents of almost any state hospital for the insane.

Similarly, there are probably more amusing incidents—amusing to the “defendant” as well as to the disinterested court attaches and spectators—in the courts that deal with insanity cases, than in any other department in the halls of justice. Which is a most fortunate thing.

Paradoxically, but unfortunately, the most fatal form of insanity is the happiest. The euphoria of the “paretic” is proverbial. He is entirely satisfied with himself, pleased with his

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surroundings, content in his imaginative great wealth, proud of his good looks, and sufficient in his wonderful ability and manly strength. What more on this earth could one ask? The distress is solely with his friends and relatives. Yet, from any viewpoint, some of the fantastic thoughts and actions of some of these patients are most amusing.

Recently one of these, a middle-aged woman, obviously of gentle birth, was brought before a kindly judge in one of the lunacy courts. She seemed to be peculiarly alone in the world, although she had given the names of two persons who she said were her sisters. Yet no one seemed to be able to locate these alleged relatives. The person's own name was Gertrude Hales, and the judge, the Hon. Walter Guerin.

Although the law in certain states still requires that insane cases must appear and be "tried" before a Superior Court judge, court-settings and formalities are done away with as much as possible in such cases. So in this instance, when Gertrude was brought before the judge at her "hearing," it was really a matter of taking her place at a large table about which were grouped the judge and the doctors who were associated with him, and a little group of other kindly disposed persons.

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Among the other papers handed the judge in this case was one upon which appeared the names of the persons that Gertrude had claimed as her sisters.

"Do I understand you to say, Gertrude," the judge inquired kindly, "that you have some sisters living near here?"

The patient answered in the affirmative. And the judge, looking down the list of names, found the first one to be that of Gertrude Halstead.

"Who is Gertrude Halstead?" he inquired.

"Oh, that is one of my sisters," the patient replied.

"Your sister?" his Honor inquired, "this lady's name is Gertrude, and your name is Gertrude."

"Oh, yes," came the reply, with assuring smile. "You see we are twins."

In the meantime, the judge, looking through his list, found the other alleged sister, this time Gertrude Barr.

"Well, then," he inquired, "who is Gertrude Barr?"

"Why, she is also my sister," the patient assured.

"But her name is Gertrude also—*three* Gertrudes?" the judge smiled.

"Yes, indeed," she asserted, confidentially. "You see, Judge, we are triplets." And, entirely

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satisfied and greatly pleased with her explanation, she smiled her childish happiness at His Honor. She was by all means the most cheerful person in the room.

CHAPTER X

A TEST IN PRECISION

TO SPEAK of "the machinery" of the law is something of a misnomer. We think of machines as essentially mechanism of precision. The very name "machine" implies precision; that is, a mechanism that repeats itself inflexibly when in proper running order. It is impossible to imagine anything else about inanimate things.

But corresponding conditions do not prevail at all in legal machinery. If you feed exactly the same kind of raw material into the legal machine at different times, you may get entirely different finished products. That is where the human element comes in.

Indeed, too great precision often leads to suspicion in legal procedure. The witness who remembers things with anything like mathematical accuracy is usually far less convincing than the one who admits a certain flexibility.

Nevertheless, in examination of witnesses, the cross-examining attorney sometimes attempts to make capital out of the human tendency to inexact observation. Thus, he may ask the

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witness to repeat verbatim what was said to him, or what he said, on a certain occasion.

This, of course, is simply for effect upon the jury, or to confuse the witness, or for some other subtle legal reason. For everyone knows, who gives the matter any thought, that none of us remembers verbatim conversations of any length. But the members of the jury may not have thought of this fact, probably never have given it any thought at all. So when the witness, in reply to a question, states simply that he cannot repeat the conversation that occurred, they may question his credibility, precisely as the lawyer intends.

"Will you please tell the jury," the cross-examining attorney commands the witness, "exactly what was said on this occasion—what you said and what he said?" And if the witness is a novice at court procedure he may attempt to do this impossible thing, with perhaps disastrous eventualities.

What he should do is "relate in substance" the gist of the conversation, as the law permits. But one must bear in mind that the person in the witness chair under cross-fire by a skillful attorney is undergoing an unusual and terrible ordeal. Most persons in those circumstances are unable to think with their usual clearness.

When, then, they are asked to repeat a verbatim conversation before a critical, possibly hostile audience, it is little wonder that some of them make a bad impression on the jury, when in point of fact they are entirely honest.

Occasionally attempts to do this sort of thing backfire disastrously. Particularly is this true when the cross-examining attorney is careless, or is under-rating his intended victim. Thus, in one of the notorious murder trials, the cross-examining attorney asked an expert witness to repeat exactly the conversation he had held with the accused prisoner.

"Tell the jury the exact words used by yourself, and by the prisoner on this occasion," the attorney demanded.

"Do I understand you to ask that I state verbatim the conversation that was held upon that occasion?" the witness parried.

"Yes, that is exactly what I am asking," the attorney replied.

"I can't do it," the witness protested. "You are asking something that is not humanly possible."

The attorney, sensing that he had got the witness into a corner, rose and stood impressively before him, with raised finger, as he put the next question:

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"Do you mean to have this jury understand," he inquired, "that you really held an important conversation with this prisoner and that you are unable to repeat the conversation at this time?"

"Yes," the witness conceded, "I admit that I cannot remember the precise words of this conversation any more, Sir, than you can remember the precise words of the question you asked me just four sentences ago," he flashed at the attorney, And then added: "And the stenographer's notes will verify my statement."

This shifted the burden from the witness to the attorney. He had asked the impossible, and now the witness had shown that it was impossible by challenging him to repeat his own questions, checked by the stenographer's exact notes.

Needless to say, the attorney did not accept the challenge. But the effect of the incident upon the jury was not at all as he intended.

BY A SLIP OF THE PEN

In the course of a half-hour's talk a person makes an amazing number of statements. Surprisingly many, if an exact record is kept. Moreover, few persons can remember and repeat precisely just what has been said, even immediately after the conversation has taken place; and the passing of time effaces the memory of

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all but the most conspicuous high-lights of such a conversation.

This is particularly true in the case of expert witnesses, for a great part of their testimony consists of opinions about abstract things. The case is a little different with a person who is narrating events that he has actually observed, as these are impressed vividly on the memory and are less easily forgotten. A man has a mental picture of some disaster, for example, which he may describe precisely time after time so that his narrative, after a lapse of five years, is practically the same as his original statement, because the mental imprint remains practically unchanged.

When such a person is called to the witness stand to repeat his testimony, as frequently happens in re-trials, he tells practically the same story on each occasion, with only changes in diction. Even with the court record of former performances before him, the cross-examining attorney finds little consolation in the way of contradictory or confusing evidence. Of course, the attorney searches for flaws in a comparison with the statements made on the former occasion, but ordinarily the changes are trivial and the story substantially the same.

One of the best examples of this in recent years

is that of the statement made by Jack Rose at the various trials of the four notorious New York gunmen and police officer, Becker. The gist of Rose's story was always the same, and unshakable.

But the case may be very different with expert testimony. In this case theories and opinions rather than directly observed facts are involved. And such things are not only more difficult to remember, but are really subject to change. Thus, an expert testifying about a case in which he has given testimony two or three years before, is sure to make certain statements that vary somewhat from his statements on the previous occasion. They are sufficiently divergent, at least, so that a clever cross-examiner may often make capital of them. And yet the witness may be absolutely honest on both occasions.

At such trials the one thing that the expert witness dislikes above all others is the record of his former testimony, the "transcript." Particularly is this true if he has not had a chance to review that testimony, as usually he has not. So, when the cross-examiner begins his dissection, asks the question and receives the answer and then compares this answer with the one made to a similar question at a previous trial by reference to the transcript, it is a most uncomfortable period for the witness.

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"Let me see," the attorney begins, turning the deadly pages of the transcript as he searches, "you have just stated that about twenty per cent of all persons afflicted with mental diseases have the particular kind of affliction called paresis. Did you hold this opinion two years ago when you testified in this case?"

For the life of him the witness cannot remember whether or not that was his exact statement two years before. Opinions and percentages about medical things change from time to time, are subject to fluctuation. So it is quite possible that in the previous trial the witness may have made the estimate as low as fifteen per cent, or as high as twenty-five. Possibly he made it twenty per cent, the same as at present. But whatever the case, he has no way of knowing, and the lawyer has, because he holds the transcript.

It is a trying situation, but positively of no intrinsic importance. Psychologically, however, it may prove of very great importance in its effects upon the jury. If it could be shown that the witness has made a statement at one time about this case and now makes other statements, even if they are only slightly variant, the jury may form an opinion not particularly complimentary to the witness. The witness says twenty per cent now. He said fifteen per cent then.

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"What has caused you to change your opinion?" asks the cross-heckling ogre.

"Nothing—it hasn't changed—it's only an estimate, at best."

But the jury does not get this. And, therefore, when the cross-examining attorney springs the transcript of the former case unexpectedly, it is an unhappy moment for that witness.

Sometimes the witness finds a loophole, takes the cross-examining attorney by surprise, and disarranges his plans. For example, in a very celebrated case in which the mental status of a well-known millionaire was involved, the old transcript proved a boomerang in a most unexpected manner. One of the medical experts had testified in the former trial. As this had occurred two years before, he had practically forgotten it. So it was a complete surprise when the cross-examining attorney opened his brief-case and extracted the typewritten document with the familiar blue cover—the transcript of the previous case

With just the suggestion of a grin, the attorney presented this document so that the witness might examine the title on the cover to identify it. He was fully aware that the witness was not expecting this move—did not even know of the existence of this document; fully aware, too, that

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after this lapse of time he could play havoc with the memory and statements of the witness. Even though there would be no absolute contradictions, the statements on this occasion would differ sufficiently to furnish ammunition for jury purposes.

All this flashed through the doctor's mind while he scanned the blue cover of the document in his hand. Then, handing it back to the attorney without a suggestion of a change of countenance, he said simply:

"No, sir; that is not my deposition."

The lawyer stared at him in amazement. "You deny that you made this deposition," he asked.

"Most assuredly I do," the doctor replied, "at least, that is not my name on the cover. This document is credited to a person of the same surname as myself, but whose first name is 'Edwin.' My name is Edgar."

The lawyer glanced at the name on the cover. "Oh, well, that is obviously simply a stenographer's slip," he said carelessly. But he was bluffing. He recognized he was likely to find bad traveling ahead. So he proceeded cautiously, turning the pages of the document until he reached the place that suited his purpose.

"You stated a moment ago, Doctor, did you

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not, that—" and he repeated one of the doctor's assertions, and had the court reporter read from his notes the exact answer as given by the physician.

"Yes," the doctor replied.

"Now, I find in your former deposition, and in reply to practically this same question, you gave the following answer," and he read from the typewritten pages in his hand. "That is what you said, is it not, Doctor?"

The doctor was now entirely at ease. "No," he replied, "I don't remember saying that, although it seems to correspond almost precisely with the answer I have just given. But that document you hold in your hand is of no value, as proved on the face of it. Any stenographer so careless as to make an error in the most important part of the document, the deponent's name, is wholly unreliable."

By this time several of the jurors were smiling; and even His Honor narrowed his eyes a little. The doctor had turned the law's most exact legal weapon, the demand for absolute accuracy even in spelling, against his tormentor.

"But you do not deny, Doctor, that this is your answer, at least in effect!" the attorney pursued, realizing fully that he was at a disadvantage.

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"No, only to the same extent that I would deny the accuracy and the exact application to an individual of a name that sounded differently and was spelled differently than my own but was still alleged to be mine," the doctor smiled.

The attorney changed his line of attack, and presently laid aside the blue-covered document unobtrusively. A trivial slip of three little typewriter keys had rendered his most effective weapon innocuous.

WITH YOUR OWN EYES

"How do you know that this thing happened?" the attorney inquires of the witness.

"Why, I saw it with my own eyes"—being the only way that one may really see anything, but a form of speech that adds verity to the statement.

But *what* did you see? And did you see it all? And did your neighbor see what you did? Surely, if you are looking directly at something that is transpiring, with your attention specially focussed upon it, you would see what happened, and the person standing beside you would see precisely the same as you. At least one would suppose so.

Yet, it isn't so at all, as a snapshot and the movie camera prove in a most amazing manner. Indeed, it is an entirely justifiable legal assump-

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tion, that if you and your friend standing side by side and witnessing an event testify in detail that you saw precisely the same thing, you lay yourself open to suspicion that you have gone over the thing very carefully with your friend before testifying. And this assumption that the average observer sees very little, and that no two persons ever see precisely the same, is justified by the following test:

The members of a mixed audience are asked to look intently at an object that will be shown them and estimate the number of spots on the surface without counting. Then a flat surface with twenty-five black dots scattered about is exposed for a few seconds. The number of these spots estimated by individuals in the audience varies between ten and two hundred. Indicating that if one witness in a case testified that about ten persons were present, where another asserted that there were at least two hundred, both of them might be entirely honest—also inaccurate.

But the most convincing exposure of man's inaccuracy of observation is made by the movie camera. The members of an audience are asked to observe minutely everything that is done by a man standing before them while the camera-man cranks his record. In a test of this kind made recently, eighteen members of the audience saw

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simply this: the man standing before them and holding in his right hand a whirling, brightly colored, fan-like affair, held this thing at arm's length with his eyes fixed upon it for a certain period of time. According to the observation of the eighteen observers, he did nothing else—made no other motions with any part of his body. The eighteen were all positive of this.

But more observing members of the audience saw several other things; and the movie camera recorded this: While the man held the whirling machine in his right hand with eyes fixed upon it, he felt in his pocket with his left hand, took out a bunch of keys and laid them on the table; took a notebook from his pocket and laid that upon the table, opening it; took a pencil from his pocket and laid that upon the table; took up the bunch of keys and replaced them in his pocket; opened the notebook, wrote something with his left hand; closed the notebook and replaced it in his pocket.

Seeing is not believing, then, after all; or, at least, it shouldn't be. And sight is only one of the five senses that are not always wholly reliable. For example: The members of a mixed audience of average intelligence are asked to fix their attention upon a man standing before them who holds a stop-watch and raises his finger for an unknown interval of time, which he registers with the

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watch. Each member of the audience then writes on a piece of paper the length of time that he believes has elapsed between intervals. These answers will vary between a minimum of two seconds to a maximum of sixty. The actual interval is ten seconds. Showing how entirely unreliable is one's unchecked estimate of time, even under ordinary circumstances. In extraordinary conditions it is even more so.

One of the best examples of this was shown in an experiment made by Adela Rogers St. Johns during the Harry New trial. It may be recalled that the outstanding feature of this trial was the fact that the accused man sat in a fixed position, practically without change, during the entire ordeal of the trial. It was contended by certain physicians that this posture was an "insane mannerism"—that no sane person could hold a pose with such fixity and persistency hour after hour and day after day.

Mrs. St. Johns, deeply interested in the theory, determined to test it for herself. Coming into the courtroom at the opening of the trial, she assumed practically the same posture as the prisoner and held this position as long as she could.

According to her impressions, hours rolled by as she sat listening to the droning evidence of the courtroom, the objections of the lawyers, the

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judge's rulings—an endless period of time. Time and again she was impelled to move—felt that she could hold the pose no longer. She knew it was time for the court to adjourn for the usual recess after two hours, and her stiffening muscles warned her that unless an adjournment was taken soon, she would be unable to move at all. And, in addition to these physical tortures, she experienced all manner of mental sensations, a veritable jumbling of the brain cells, a dulling of the emotions, and finally an overwhelming impulse to change her position, to look at the clock. Finally, unable to endure the thing an instant longer, she turned to the time piece on the wall. She had been holding the position exactly fifteen minutes! The prisoner continued to hold his pose for two hours longer.

In the mind of Mrs. St. Johns, therefore, there was no doubt that the attitude of the prisoner was, as the alienists contended, the catatonic posture of an insane person that no normal-minded person could simulate successfully.

Misjudgment of time is shown also in the individual estimates of the speed of moving objects, particularly automobile objects, as shown every day in our courts.

"Officer, how fast was this man driving his car?" was asked recently in a case where the

defendant himself asserted that he was driving "not more than fifteen miles an hour." The officer replied that he had not seen the performance personally, but had "tagged" the man on the testimony of several observers, who declared the speed anywhere from twenty-five to forty-five miles an hour. One witness said that, judged by the roar and rattle, the machine "must have been going at a tremendous rate."

"Well," said the defendant, with a grin, "the officers have the machine in just the condition that they took it away from me. And if any one can make it run half as fast as some of these fellows say it goes, I'll be glad to stand the consequences. I'll admit that I was driving it just as fast as I could make it go."

So the Justice, who was practical-minded, accepted this challenge. A skilled mechanic was sent for and instructed by the court to run the machine up and down the village street as fast as he could make it go, with a motorcycle officer riding at each side, getting the speed record.

After completing this test, the mechanic testified that he had driven the machine at its top speed. The first traffic officer asserted, with a grin, that his speedometer recorded a speed of seventeen miles an hour; while his brother officer's speedometer showed a flat sixteen.

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So the case against the "speedster" was dismissed. The rattle and clang of the old machine had given an entirely erroneous impression to the scurrying pedestrians.

CHAPTER XI

NOT EVEN WHEN YOU SMILE

THERE are two appellations in the English language that are peculiarly derogatory and insulting. One of these—the one immortalized by Owen Wister's "Virginian" in the poker scene—may be used as a term of endearment or admiration if interpreted by the donor's smile. "When you call me that, *smile*," directed the Virginian, fingering his six gun. And the other fellow, smiling, prolonged his mundane residence.

But the other term has less flexibility. Even though you smile, it is a doubtful compliment to call your friend "crazy;" and if applied without the smile, it is the acme of insult. Yet it is but the name of an unfortunate illness, logically no more degrading than appendicitis, gall-stones, or herpes zoster.

A young, inexperienced, small, and somewhat erratic attorney had been retained, for a small consideration, to defend a man whose sanity was questioned. The man had been declared insane by a Superior Court Judge, and his medical commissioners, and several other competent alienists had reached the same conclusion. But

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as the case occurred in one of the states where mental unfortunates may demand a jury trial even though disinterested judges and doctors have pronounced him insane, this case was brought to trial by jury.

In such cases the district attorney is the prosecutor. So, opening the proceedings, this attorney called in all the physicians who had examined the man, had them take the stand successively, make their statements that they considered the man mentally unsound, and give their reasons for doing so. Following which it was the business of the nervous little lawyer to discredit as much as possible the statements of these learned physicians by cross-questions.

As it happened, there were several of these physicians who gave testimony. And, since the little attorney's knowledge of insanity was extremely limited, he pursued about the same line of cross-examination in each instance. The first physician called to the stand made the statement that the prisoner was "in a highly nervous state." So the lawyer made this the basis for some of his cross-fire questions.

Pacing back and forth restlessly, jamming his hands into his pockets, crossing them behind him for an instant, or running his fingers through his hair, the little attorney would inquire:

"You say that this patient is nervous, do you?"

To which the doctor would reply in the affirmative.

"Well, is nervousness a sign of insanity?" he would pursue.

And usually the doctor would say that it was one of the signs, although not necessarily so.

Then the little lawyer would say: "Well, you see I am a nervous man. Is that a sign of insanity—do you think I am crazy?"

And since the appellation is taboo, even in reasonably good society, including the court room, the good-natured doctor would usually explain apologetically that no such implication was intended.

Considering the nature of the question, the little lawyer's obvious eccentricity and peculiarly irritating manner, and that his long drawn-out and unnecessary questioning was keeping these busy, unpaid medical witnesses from attending to their professional duties, the situation was exasperating. Particularly so to one old and experienced physician who had sat cooling his heels for two hours waiting for his call to the witness stand.

When his turn finally arrived, this old physician took the stand and told, very briefly, what he thought of the prisoner's condition and why he

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thought so. And then he was turned over to the little man for cross-examination.

"So you say this patient is nervous?" the little lawyer started off as usual.

"No, I didn't say so," the witness replied. "But if you wish me to I will say, now, that he is nervous."

"Well, *I* am nervous," the little man banalized. "Do you think *I* am crazy?"

The doctor slowly scrutinized the little man from head to foot. Then, with a twinkle in his eye and just a suggestion of apologetic disinclination to hurt one's feelings, he said:

"Why, really, if you don't mind, I'd prefer not to answer that question."

One must not take too many liberties, even with an alienist under cross-fire.

JURORS, BUT STILL WOMEN

No one need doubt that an element of delicacy has been injected into court procedures by the woman juror. Her presence assures that. Of course, there is nothing about this in the letter of the law; that indubitable block of granite has not changed. But, as every one knows, the most effective laws are often the ones not written in the statutes. And one of these unwritten laws provides that, although woman has de-

scended and condescended to juror duty, she has not relinquished one iota of the femininity with which she has dominated mankind since long before the dawn of written history.

Woe to the attorney who overlooks, forgets, or disregards the conventions. Who imagines, for example, that he may presume upon the inherent instinct of modesty in women, even though he has a legal right to do so, simply because they are in the jury box. He will find the reproof written in their verdict. And he should so find it.

A young man, not old enough officially to help conduct the affairs of his Government, but in the advanced adolescent state that carries with it full legal responsibility for any misconduct, was on trial recently before a mixed jury. His crime was that of misconduct with a consort who lacked a few weeks of attaining an age when this "misconduct" would not have been criminal at all. The importance of that law-made period now carried with it the possible penalty of fifty years' imprisonment if the young man were convicted.

True, the young woman seemed to be quite as much at fault as her boy companion and willingly so; that is, her guilt was scarcely less than his, if judged by a commonsense, intelligence standard. But not at all so in the eyes of the law. Legally, the boy alone was guilty.

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For it was rumored, although not so testified, that this girl's character was not of the spotless purity of the lilies. Not so testified, simply because the law does not permit such testimony, insisting with the puritanical bigotry of blind injustice, that every woman under a certain age is pure, and can do no wrong, even though she does do it, and flagrantly.

So this young man was on trial with fifty years of steel-crossed bars confronting him. He was guilty. And he frankly admitted his guilt, at least to the extent of participation.

The circumstances of the case offered good grounds for extenuation, if not actual condonation. Yet the prosecuting attorney's attitude made condign punishment almost certain. For some reason, known only to prosecutors, this attorney had decided to punish the young man to the full extent of his powers—to lock up this very likable, and almost excusable boy for the rest of his life.

However, in his legal ardor—his righteousness in the pursuit of duty—the attorney overlooked an important item. He forgot that women are women, even though jurors.

The young defendant, on the witness stand, in response to the prosecutor's question, had described in a general way the events of the

accusation; had described them modestly and inoffensively, but in a manner that no adult of average understanding could fail to comprehend. But this did not satisfy the prosecuting attorney. He insisted that the witness go into minute, disgusting, and wholly unnecessary details in his testimony. And he put his question very bluntly to the young man.

The boy, obviously embarrassed and chagrined at the ordeal he was undergoing, declined to go into details. "I will not," he replied, in response to the attorney's question, firmly, although not offensively. "There are ladies on the jury, and I will not describe those things. I have described them already so that anyone can understand."

"Do you mean, then, that you absolutely refuse to answer my question?" pursued the prosecuting attorney.

Before the boy could answer his own attorney was on his feet—Henry Harris, adroit veteran of many a stricken field.

"Your Honor," he said, addressing the Court, "I recognized fully the right of the prosecuting attorney to press that question—the legal right, at least. But the question is entirely unnecessary. Every member of the jury is an intelligent adult. They understand the situation; know

what is alleged to have happened; know precisely what the prosecuting attorney intends to compel my client to describe vulgarly, which he has already described decently. And so I request the withdrawal of my opponent's question, not on legal grounds, of course, but on the grounds of common decency."

His Honor looked expectantly at the prosecuting attorney. "Common decency" is no grounds for legal objection. But now, since the defendant and his attorney seem so anxious not to have the question answered, the prosecutor was obdurate. He would have, at any price, the indelicate answer that was his legal right. Shylock would have his pound. And as the judge had no other alternative than to sustain this perfectly legal attitude, the attorney again demanded that the defendant answer his question. And again the boy refused. "I will not describe those things in the presence of these ladies," he reiterated.

This forced the judge into the arena. The refusal of a witness to answer a legal question is contempt of court. "Do you understand," he asked of the witness, "that if you refuse to answer this question I can punish you—lock you up, for not doing so?"

"Certainly I do, Sir," the boy replied respectfully, quietly.

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"And you refuse to answer?" the judge persisted.

"Yes, Sir," the boy answered, dropping his eyes in entirely natural and unassumed modesty.

His Honor looked out of the window into vacancy, tapping his desk lightly with his fingers, as was his habit in thought. The prosecuting attorney stood waiting.

"I will render my decision in this matter later," the judge said, after a minute. "Proceed with the case."

"Since the witness refuses to answer my question," the prosecuting attorney stated, "there is no use in proceeding. My case is finished."

"And mine," rejoined the defense attorney.

The argument to the jury by the defense attorney, which followed immediately, was brief and unweighty from a legal standpoint. It rated higher in the field of psychology.

"Ladies and gentlemen of the jury," he said, "my client is accused of violating a certain statute that involves the honor of woman. You saw him a moment ago spontaneously, and because of a delicacy and respect for the honor of women, risk punishment and imprisonment rather than offend the womanly delicacy of the ladies present. I leave it entirely to your decision whether a boy of this natural modesty and consideration for

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women is likely to be guilty of dishonoring a woman, of which he stands accused."

The argument of the prosecuting attorney was along utterly different lines. He tried no play upon the emotions, relying upon the technical letter of the law, which he quoted in detail, closing his argument with a demand that this culprit be punished with the full measure of legal penalty.

Meanwhile the members of the jury, most of them women, sat quietly in their places. They listened to the judge's instructions, and then retired to the jury room. But they returned to their places ten minutes after leaving them to "deliberate" over the question of the guilt or innocence of this boy who had declined to insult them, even though legally entitled to do so.

The verdict they returned was "Not Guilty"—in the face of absolutely conclusive proof of guilt. And rightly, too. Mere guilt or innocence, or legal right, or written statute, is frail defense, indeed, against the compelling appeal to the higher emotions and sensibilities.

CHAPTER XII

THE DOCTOR AND THE JURY SYSTEM

EVERYBODY jumps on our jury system: and no one offers anything better. Most of the critics, I am sure, would agree with a statement of Judge Hughes, Rupert's father, who gave his opinion that juries were probably right about fifty per cent of the time.

"In other words," commented a lay observer, "cases could be decided equally well, and the ends of justice reached with the same precision and much more expeditiously, by the ancient and honorable method of flipping a coin."

To which an attorney replied: "Oh, no, not at all. For, you see, certain clever lawyers would have special coins made with heads on both sides; and they'd win all the time. Of course, even now, coin plays an important part in winning cases. But merely flipping it in the air is too flagrantly simple for legal procedure. The law must be made up of big machinery, with plenty of oil cups. Coin makes excellent filling for the oil cups, but it doesn't take the place of the machinery itself."

However, despite the more or less just criticism

that is heaped upon our jury system, no satisfactory substitute has been found. Theoretically, one intelligent, educated, and fair-minded judge should strike a higher average in deciding cases than any mixed jury. Certainly he should, and undoubtedly he would—if he happened to possess the qualities just enumerated. But there is just where one of Mr. Hamlet's "rubs" comes in: the judge may be none of these things in any pronounced degree. Indeed, he may be simply the human unit that the politicians have decided will be the choice of the *vox populi* at the next election. Moreover, he may be absolutely honest in dispensing justice according to his lights. Yet, even so, the average quality of his decisions will not tend to alter the opinion of many lawyers that the lone judge system of dispensing justice should not replace the present jury system.

The final outcome of the Leopold and Loeb case suggests this. And yet this type of case, where the question of insanity is involved, is the very one in which it would appear that an intelligent judge would be far more likely to give a just decision than that of a jury whose average intelligence is much lower. When the intelligence level of the jury is of an especially high grade, as in the case of the remarkable jury that sent Harry Thaw to Matteawan, instead of the death house,

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the situation is very different. But such juries are rare exceptions.

The difficulty in the case of both judge and jury seems to be a matter of optical defect, inability to see straight. But the respective causes of this obliquity are quite different, even when the net results are the same. In the case of the jury it appears often to be a congenital deficiency, while the judge's blindness is likely to be the result of too many legal technicalities—trees that obscure the woods.

One would suppose, for example, that in a case where the question of typhoid fever is involved, where the prisoner had the physical symptoms that are present in typhoid fever and in no other condition, where the laboratory tests give positive evidence of conditions that are present in no other disease, and where competent and disinterested physicians testify that this disease exists, and no physicians dispute this testimony—one would suppose that on this evidence even a judge would be able to reach the conclusion that the man had typhoid fever. He could, and undoubtedly he would—in a case of typhoid fever.

But when the same kind of positive evidence is presented in a case where the mental disease is involved, there is absolutely no predicting what

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His Honor may do. Judged by results, the flipped coin becomes an oracle of justice by comparison—always barring the possibility of the double-headed coin, of course. Let me cite a concrete example.

A few months ago a certain man got himself into the newspapers first and into court afterwards by chastising his sweetheart up and down a public highway. The police officer who interrupted the performance pronounced the man a "nut." And police officers are pretty good diagnosticians in such cases.

So the prisoner's attorneys decided to plead insanity as a defense. They did this for several reasons: (1) They thought the man crazy; (2) his criminal act seemed that of an irrational person, and (3) many friends and neighbors related other recent irrational acts of the accused.

So the prisoner was turned over to an alienist, who put him through a series of office, hospital and laboratory tests, which resulted in perfectly definite proof that the man was insane. It seemed certain that any judge, given this evidence, would pronounce him so. Indeed, since the charge against the man was a trivial one, the doctor suggested that probably no other evidence would be necessary than copies of

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hospital and laboratory findings presented to the judge.

The attorneys thought otherwise. They knew human nature, particularly court-room human nature far better than the medical man, who still retained a moiety of his youthful idealism. So they called in another alienist to sustain the first one.

Now, it developed that the judge before whom this man was to be tried was greatly interested in insanity. He was reputed to have made special study of the subject. So, to the doctors at least, it seemed to be merely a matter of laying the facts before His Honor. The accused man had the definite physical, mental, and laboratory signs of having the form of insanity called general paresis.

General paresis, it should be explained, is the only form of insanity that shows perfectly definite physical, chemical, and mental symptoms that may be demonstrated positively and precisely in hospital, laboratory, and autopsy room. With no other form of insanity are such precise tests available; none where the element of guess-work in diagnosis is eliminated.

To be sure, the trained alienist acquires such skill that he can make correct diagnoses without laboratory reports. But in cases of general

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paresis he bolsters his scientific guesswork with this perfectly definite, indisputable physical and chemical evidence. Moreover, this evidence is so tangible that even a child can understand it.

It was this kind of evidence presented to the judge in the case just cited. First, the laboratory examination of the prisoner's blood and spinal fluid showed that he was suffering from an old blood infection. No other condition would give similar laboratory findings, and this infection is alone responsible for this form of insanity. It was also found, and demonstrated to the judge, that the pupils of the man's eyes were "fixed." That is, when the light from a pocket flash was thrown into the patient's eyes, his pupils did not contract instantly, as is the case in normal individuals. This symptom of itself is definite evidence of brain involvement and is pretty positive evidence of this particular kind of abnormality. Indeed, in connection with other definite symptoms, it is considered conclusive.

There were other plainly discernible physical signs that are considered all but positive evidence. For example: the patellar reflex, or "knee-jerk," was out of order. This "knee-jerk" is the uncontrollable kick that a person gives when tapped lightly just below the knee-

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cap if sitting in a relaxed position with the knees crossed.

Many persons are familiar with this peculiar phenomenon, but very few understand that this responsive kick—that is, the quickness and vigor of the kick, or its absence, gives most important information to the alienist. From this symptom alone he can often determine that something is wrong in the brain. Particularly is this true in cases of suspected general paresis where there is no response to the test—when the leg refuses to give the impulsive kick.

In the case of this accused person, there was no responsive kick to the doctor's repeated pounding below the knee. Moreover, he showed a peculiar trembling of the lips and of the tongue, that is characteristic of this disease. Also, he had a slurring speech, and an inability to repeat such sentences as "Massachusetts Riding Artillery Brigade," or "Methodist Episcopal," or the old familiar "'Round about the rugged rocks the ragged rascal ran"—these classical tests, upon which our fathers and grandfathers relied in detecting paresis, before the modern Wassermann and other laboratory examinations made the diagnosis certain.

All the symptoms, in detailed array, were presented to the presiding judge. He saw and heard

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and questioned and tested for himself. Also he knew the history of the criminal act, which of itself was that of a lunatic rather than a sane man, and there was no conflicting testimony. Apparently the case was clear, unquestioned, conclusively proven.

And yet the judge, after mature consideration, decided that the man was absolutely sane and responsible! Surely a jury could do no less!

Yet, even this utterly absurd decision reflects no personal discredit upon the magistrate. The fault lies in our present legal conceptions. Insanity is a crime, not a disease, in the eyes of the law, and the legal mind is steeped in this archaic fallacy.

Another important element in the question of trial by judge rather than by jury, is that of human prejudice. No one is free from this, of course, not even a judge. But the elements of the old trilogy; love, politics, and religion, are largely matters of emotional prejudice having very little to do with education or intelligence. They influence and pervert judgment, and cannot be greatly changed or controlled by scientific training, logic, or law. Otherwise, all intelligent persons would love the same, vote the same, and attend the same church. And since experience shows that no two persons do agree absolutely

about these three fundamental emotions, and every person is influenced by them, the only way to strike a reasonably high average of justice is to get the opinion of a certain number of persons upon any subject in which these emotions are concerned. That is precisely the function of the jury.

Thus, juror number one in a murder case may wish to hang the accused, or worse; while juror number twelve would like to set the man free with a vote of thanks. But the general average in jury opinion is somewhere in between these extremes, such as a verdict of manslaughter. And experience shows that the collective judgment of twelve ordinary, even very ordinary, persons, is likely to be more just than the average judgment of one person, even a magistrate. The law itself recognizes this in a practical and conclusive manner by its Courts of Last Appeal. Supreme Court questions are never left to the judgment of a single individual.

The reason for this is that the age-old trilogy just referred to is forever influencing an individual's judgment. Judgment, unlike education, is largely a natural endowment, not an acquirement. Unless one possesses good judgment, he will not acquire it by education, and experience will not create it.

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Bad judgment often asserts itself in relatively minor cases of law, more frequently perhaps than in the major cases. That is, the judge lets his personal prejudice unconsciously slip into minor cases, whereas he would be less likely to do so in the important cases. For, after all, each of us, even judges, measure the other fellow in our own half-bushel.

It is for this reason that a wide latitude in honest disagreement should be tolerated. Indeed, such latitude is allowed, from the Supreme Court of the United States to the lowliest Justice Court.

But public opinion draws the line at certain subjects. Thus, if five alienists testify one way about a certain insanity case, and four alienists testify differently, the public feels that there is dishonesty somewhere—well paid dishonesty, too. The Thaw case, Burch case, Loeb case, prove this. And yet the members of the Supreme Court of the United States frequently show precisely this ratio of disagreement in their decisions—decisions of far greater importance than any of the cases just cited—but no one suspects their being “bought off.”

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THE INFERIORITY COMPLEX OF JURIES

The legal estimate of the juror's mental inferiority is shown unmistakably in legal procedure. For example, in presenting his case to the jury, the attorney habitually makes statements and demands that are insults to adult intelligence. He is playing the transparent legal game of pretending to make the jury think that he really is attempting to make them think that he means what he says. For example, a district attorney will demand the death penalty in a case where he knows such penalty would be utterly unjust, in which the attorney himself might be shocked and have conscience-trouble if the jury granted his demand.

Thus, in the Kid McCoy murder trial the death penalty was demanded of the jury, and urged for hours. Yet no one thought that the ex-pugilist deserved or would get "worse than manslaughter," if that. Which was precisely what the jury thought and did. Also, a verdict that seemed entirely satisfactory to the district attorney who had demanded his bushels of blood.

The same game of childish exaggerations—insults to anything above childish intelligence—prevails in civil cases. The lawyer flamboyantly demands twenty-five thousand dollars—

fifty thousand—any old glibly-tongued figure for his client, and is jubilant over the one thousand dollar award that he hoped for in the beginning. Nobody considers his original demand as anything more than a childish “form of speech,” of no more significance than bidding your neighbor “*good morning*” on a rainy day. And the neighbor returns your open prevarication in kind, also meaning absolutely nothing.

Nevertheless, these childish legal exaggerations are a reflection upon the juror’s intelligence. And occasionally an especially erudite juror must recognize this, and resent it. Particularly so, since the lawyers make no such flagrant exaggerations on presenting cases to judges, whose higher intelligence-level is legally established.

“If we used the exaggerations and played the game of make-believe in the business world that we do in court,” said one lawyer, “we would land in the poor-house, jail, or an asylum. Legal exaggerations have about the same meaning and effect as those of a certain old trusty that I once saw in the Matteawan hospital for insane criminals.” This was a happy and contented old German, named Charlie Beeman, who had spent twenty years in the daily task of taking care of the garbage cans and, incidentally, shooting millions of imaginary rabbits. While working

away at his cans, the old fellow talked to himself and laughed continuously at the sport he was having. Every now and again he would pause in his work, raise his arms as if holding a gun, aim carefully, and then shout, "bang!"

If an officer happened along during the carnage, Charlie would run up to him and exclaim gleefully:

"I shoot ten t'ousand rabbits!"

"Only ten thousand, Charlie?" the officer would inquire, surprised at the small bag.

"Ten t'ousand million," Charlie would hasten to correct; "ten t'ousand million rabbits, at one shoot!"

Charlie was just pretending. And he knew it, and knew you knew it. But, since he was a lawyer before going to Matteawan, I suspect that his tendency to exaggeration was a holdover from some of his courtroom experiences.

CHAPTER XIII

LOOKING BACKWARD

A SHORT time ago an observer, living in the present, but writing a hundred years hence, described some of our present-day legal foibles as viewed retrospectively a century from now. This writer paid his respects particularly to modern medicine of the early twentieth century, which he refers to whimsically as the "Dark Age." But he does not entirely overlook the methods of legal procedure of the period.

"The law," he says, "which has always been notoriously hidebound, seems to have lived up to its traditions during the Dark Age period. The one redeeming quality of the lawmakers seems to have been a subtle and abiding sense of humor which radiated all through their grim work. Thus, one finds the perennial pleasantry obtruding itself everywhere to the effect that 'a man is considered innocent until proved guilty beyond a reasonable doubt.' Apparently this was a standard legal joke at the time.

"But meanwhile, any person suspected of a crime was, first of all, locked in jail, on the assumption, we suppose, that being still innocent

he might otherwise become contaminated if allowed his freedom. But, lest the monotony of confinement prove irksome to so innocent a person, things were sometimes enlivened by certain third degree proceedings which abounded in humor—at least from the legal point of view. Of course any such inquisition method worked upon a freeborn and innocent American citizen was entirely illegal. And, let it be said to the credit of the legal fraternity of that Dark Age, that persons guilty of perpetrating these inquisitional methods were sometimes admonished, or even warned by the courts.

“But these little humorous touches in the legal proceedings before the actual trial were entirely offset by the sinister pageant of the trial itself. This trial was presided over by a judge, part of whose duty was to prevent lawlessness among the lawyers; and a bailiff, who exercised the same restraint over the audience. There were also twelve or thirteen jurors who were chosen largely for their lack of knowledge or opinion. If they had an opinion they couldn’t be jurors. Thirteen was considered an unlucky number at that time.

“The trial itself was divided into three parts. In the first part certain witnesses who were sworn to tell ‘the truth, the whole truth, and nothing but the truth,’ were allowed to tell such portions

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of the truth about the accused person's guilt or innocence as the opposing lawyers and the legal technicalities permitted. You see, the 'whole truth' part was a little legal pleasantry, also. Meanwhile, in some of the older States, such as Massachusetts, the prisoner sat in the courtroom in an iron cage built like a miniature prison. At the present time we are quite unable to understand the object of this cage unless it was for the twofold purpose of emphasizing the legal pleasantry about the presumption of innocence. In our own time it has been suggested that this human bird cage did not enhance this presumption.

"The second, and more pleasant stage of the trial, followed immediately after testimony by the witnesses. The object of this stage of the trial was to give the attorneys a chance to show their skill as orators. Theoretically, you understand, the jury was supposed to decide upon the man's guilt or innocence by evidence presented. But in this second phase of the trial it was the function of the attorneys on each side to make the jury discredit anything said on the witness stand for or against the prisoner according to the particular side by which the attorney was employed. And just as a means of emphasizing the legal pleasantry about the accused person being

innocent, the prosecuting attorney was given the place as valedictorian, so that his flights of oratory proclaiming the prisoner's guilt were the last things still ringing in the jurors' ears when they retired for deliberation, except for cut and dried platitudes read to them as a matter of form by the presiding judge.

"Looking back at this particular proceeding from the lapse of a century one can appreciate the subtlety of the law's humor in considering the prisoner innocent until proved guilty beyond a reasonable doubt. Undoubtedly it seems more humorous to us now than it did to the prisoner at that time. But the results were not nearly so bad as one might suppose; for the third stage of the trial was yet to come. This was the so-called deliberation of the jurors.

"Theoretically, you understand, each juror was supposed to have formed his opinion about the innocence or guilt of the prisoner from the statement of the witnesses and the bursts of legal oratory that had been forced upon him. And one would suppose very naturally, since he would hear no more of these things after being locked in the jury room, that his opinion expressed in his first vote would be his real opinion based on the evidence, and the only one that would be considered. But such was not the case at all. In

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point of fact, the first vote was rarely unanimous. And that was where the juror orator came into his own.

“Perhaps, as the result of the first ballot, a majority of the jurors held to one opinion about the prisoner’s guilt or innocence, while the remainder expressed precisely opposite views—this, you understand, based upon the evidence. Now it was up to the members of the jury to harmonize these conflicting opinions. And that was where convincing oratory came into play. Locked in a closed room from which none could escape the contesting orators representing one side or the other, tilted and jousting with each other, using every means at their command save actual physical violence (which, we believe, was not permitted in most cases) until at last one side prevailed over the other in the matter of convincing oratory and the jury was so harmonized that it voted unanimously.

“In cases where there was one dominating orator on the jury a unanimous verdict was often easily attained. But when it happened that there were two equally matched lingual gladiators, or gladiatoresses, in the closed arena, the result was often indecisive, and the jury was said to be ‘hung’ in the vernacular. When the jury was hung the prisoner wasn’t.

"All this strikes one as very childish. But we should remember that laws in the medical Dark Age were a heritage from the original Dark Age handed down directly and with little change. For law is essentially unprogressive.

"This peculiar childishness in legal matters was shown in another way. Thus, the standard test of an accused person's mental responsibility the country over in this Dark Age, was whether or not he 'knew right from wrong.' In the case of serious crimes when the prisoner passed the 'right from wrong' test successfully, he was hanged or electrocuted or otherwise dispensed with. If he failed in this test he was placed in a hospital or turned loose to try it again.

"This right from wrong test should not be confused with the ordeal, or primitive sink or swim test, which really belongs to a much earlier period. According to this test the accused person was innocent if he sank and guilty if he swam when thrown into the water. And although this test was described minutely by Mark Twain, who was a contemporary of about that period, it should not be understood as a legal measure in the Dark Age period. The law was, after all, somewhat progressive, you see."

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WITCHES ARE STILL IN THE LAND

Sometimes things happen in medical practice, and courts of law, that give one pause—make one wonder if the world has really shaken off superstition to any such degree as appears to casual observation. The belief in witches, and bewitchment, for example. We read with horror and amazement of the burning of persons bewitched in the “good old days” even in our own free country; and are thankful that physicians and courts are spared these vexing questions. But are they?

If you think so, listen to the following from the transcript of the superior court presided over by the Hon. Thomas C. Gould on Thursday, June 13th, in the Year of Our Lord, 1929:

A woman, so deranged mentally that the authorities found it necessary to place her in a hospital, came before this kindly and keenly intelligent judge for her “hearing.” Her husband, resentful that she was in the hospital under medical treatment, gave the following cryptic description of his wife’s misfortune, as shown by the verbatim Court Record:

Q. What has been the matter with your wife?

A. My wife has been sick. We think that the trouble with my wife is caused by a woman who

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lives close to her house, who has her bewitched, and also her boy has been sick for some time, for several weeks.

Q. What makes you think the neighbors bewitch your wife?

A. Because of lots of things and signs that we see around the house indicating.

Q. What were those signs?

A. We would see dogs. One day they told us they were going to come into our place to get her and the only thing we saw come into the place was two dogs.

Q. What did you do to get rid of these witches?

A. We haven't done very much, but there has been three in family sick like that, but we have cured them. They have been getting very well when we would take care of them. They are lots better now. This woman told us she was going to fix the boy too. My boy is sick now.

Q. Do you have a witch doctor to take care of them?

A. Yes.

Q. What is that witch doctor's name?

A. I don't remember her name.

Q. What does she charge you for a treatment to drive out the witch?

A. To get them in good shape, she charges \$100.00.

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Q. Haven't you any means of keeping witches out of your house?

A. That kind of people have a means of getting things, they give them powders or things in a secret way. I can't keep them out that way. There's lots of things we have seen that we know that is what is the trouble.

Q. Now, what has been the matter with your wife aside from the thought that you have that these witches are bothering her? What does she do, or what does she say?

A. She just mumbles and talks to herself and won't eat; refuses to eat.

Q. How long has that been going on?"

A. Four or five days. One day she has been worse than others. When they brought her here they told me they were going to take her to Glendale to a clinic. They lied to me and brought her in here. They deceived me. I didn't want her brought in here at all. She is getting worse.

The Court: We haven't had any witches in Los Angeles in one or two hundred years.

The Witness: You don't know about that.

The Court: There may be some down in Mexico but we don't keep them here. The doctors think your wife is sick and needs intelligent treatment in the State Hospital instead of treatment by a witch doctor.

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The Witness: She is not crazy.

And this, if you please, in the twentieth century. Surely the Dark Age is not entirely lightened. These are the problems still confronting the members of the medical and legal profession.

CHAPTER XIV

THE HANDWRITING EXPERT, THORN IN THE FLESH

IN THE court-room classification there are three kinds of experts: bad, worse, and unspeakable.

Then there is the handwriting expert, who is a veritable thorn in the flesh. And the thing that makes him peculiarly loathsome in the eyes of the cross-examining attorney is the fact that frequently he is right, and can prove it. Wherefore, there is always rejoicing when said attorney can confuse, disconcert, or "hang anything on" the handwriting expert.

In a battle of wits with one of these obnoxious thorns, George Greer, a clever Coast attorney, once succeeded in tripping an extremely intelligent and honest handwriting expert in the most unexpected manner.

Greer was defending a case in which the authenticity of a signature to a document was the crucial point, and the handwriting expert had given the damaging testimony against Greer's client. Try as he would, the attorney could not shake the expert's testimony.

Greer, a large, impressive, commanding figure

of a man, usually full of fire and vim, had the habit of walking about while examining a witness, keeping up a machine-gun fusillade of questions. At first he had followed his usual tactics in this case. But, after a fruitless attack, he finally seated himself, asking a few inconsequential questions.

Indifference, like energy, is infectious. And Greer's obvious indifference was communicated to the witness, causing him to lower his guard a little.

"Just one more question, and I am through," Greer said, with an apologetic gesture to the judge. Then, to the witness: "This 'Spencerian system' of writing that you have referred to was originated by a man of the name of Spencer, I presume?"

"Yes," the witness answered.

"The celebrated Herbert Spencer, I suppose?" Greer pursued, languidly pushing aside the papers on his desk.

The expert replied in the affirmative.

"That is all," Greer announced. A few hours later, however, when Greer began his argument before the jury, there was a transformation. With master-craftsmanship he began picking the expert's testimony to pieces. "This man wishes you to think," he said to the jury, "that the great

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scientist, Herbert Spencer, is responsible for this wonderful array of penmanship ideas.

"Now, I have here on the desk the complete works of Herbert Spencer. Let me read you the titles and a few lines from these volumes, which, incidentally, contain not one word about penmanship. And these are Spencer's complete works."

By this time, two of the members of the jury who had some knowledge of Herbert Spencer's writings were smiling. And the remaining ten, after a few moments' of enlightenment, wore broad grins.

For, picking up one volume after another and opening them at random, Greer read here and there paragraphs from "First Principles" and "The Data of Ethics"—complexities of human behavior, natural principles and man-made laws absolutely foreign to the subject of penmanship.

Unfortunately for himself, the handwriting expert had dropped into the court room just at the most ardent point of castigation. His presence seemed to inspire the attorney, who proceeded to pay off verbally all the cumulative old scores that had been stored up in a long period of years.

But, as recorded by Mazeppa, "time at last sets all things even" if one but watches the hour.

The expert waited and watched. And finally he evened up matters with the pestiferous legal fraternity.

It was in a case where two resourceful attorneys were endeavoring to discredit the damaging testimony of the handwriting expert. Some of this particular expert's testimony, if true, indicated that he possessed a most astonishing knowledge. For example, he asserted that he could tell the number of persons whose handwriting was part of a certain document, how many pens were used, the kinds of ink, and several other things most disconcerting to the defense.

So, in a secret conference, these attorneys laid a trap for the expert. The two attorneys and their two assistants wrote an eight word sentence on a sheet of paper, which read "There are twelve good men on the jury."

This sentence was written in an obviously disguised and labored copybook hand, each of the quartette writing two of the words, using different pens but the same ink.

Having prepared this secret document, one of the attorneys asked the handwriting expert some questions about his accomplishments, and then flashed upon him the sheet of paper with the eight word sentence. "Will you kindly tell the jury whether one person or more than one person

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wrote this sentence, and if more than one pen was used, and more than one kind of ink?" he requested.

The expert readily accepted the challenge, but asked that he be allowed to take the document to his laboratory for microscopic examination during the noon recess.

When the afternoon session opened, therefore, the expert took his place in the witness chair, holding the sheet of paper in his hand.

"Have you examined the writing on that paper and formed an opinion?" the attorney inquired.

The expert answered in the affirmative, that he had formed "a very definite opinion about it."

"Will you kindly tell the jury just what that opinion is?" the attorney pursued.

"One person wrote this sentence," the expert asserted confidently—"One person, using one kind of ink and one pen—probably a fountain pen."

The examining attorney glanced at his associates. At last they had dug a pit for the old handwriting fox, and he had fallen into it. The thing was worthy of exploitation.

"And you are perfectly certain, are you?" the attorney asked suavely, "that one person, and only one, wrote this sentence?" He had great difficulty in holding himself in hand.

"Perfectly certain," the expert answered, with little wrinkles of satisfaction at the corners of his eyes.

"Then what would you say, Mr.—," the attorney persisted, "if I were to tell you I happen to know that more than one person did the writing on that slip of paper?"

"What would I say?" the witness repeated. "I would say that you are—er—well, mistaken." "Well, then, Sir," the attorney flashed, "I will prove to you whether or not I am—er—mistaken. I know that more than one person did the writing on this slip of paper, for I happened to be present when it was done—in fact, I made part of that writing with my own hand."

There was an audible gasp in the court room. Even His Honor sat up a trifle straighter. But the expert entirely unmoved, sat smiling. Then he leaned forward, and, with a little grin, drew a piece of paper from his inside coat pocket, the exact duplicate of the one in the attorney's hand.

"Pardon me for suggesting it," he said indulgently, "But I think, Mr. Parker, when you say you are one of the persons who actually did the writing on the slip of paper, you are inadvertently referring to the one which I hold in my hand. Apparently you failed to observe that the piece of paper in your hand is a duplicate of this original

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which I have here, and which I took for examination during the recess hour!"

He held the original up for inspection, and continued: "So, you see, that you are entirely wrong, although unintentionally so, when you say that you helped to make the writing on that piece of paper in your hand. You did not. For I made it myself with my fountain pen, seated at my own desk and copying exactly from the slip of paper that I have here. But, as I was able to determine, even by a casual inspection, you did indeed write some of the words on this piece of paper—this original one. In fact, if I am not mistaken, you wrote the last two words and made the period at the end of the sentence. Three other persons made two words each in this sentence, each using a different pen, but the same ink."

"Am I right, Mr. Parker?" the expert flashed at the attorney.

And Mr. Parker, still game in defeat, simply shrugged his shoulders, and laughed with the others.

A VENTURE IN CHECKS

Doubting the opinion of a handwriting expert cost a firm of jewelers a tidy sum of money recently. To be sure, the handwriting expert's

opinion was not an impressive factor in the beginning. It proved to be so later.

A well-dressed, clean-cut, middle-aged man walked into a downtown jewelry establishment one Saturday afternoon and purchased a diamond ring for five hundred and fifty dollars. In payment he offered fifty dollars in currency and a check drawn to "cash." The signature on the check was well known to the head of the jewelry establishment. It was that of an attorney, with whom the firm had had difficulty at one time.

The outcome of this difficulty was entirely satisfactory to the firm, considerably less so to the attorney. Yet this signature on the check appeared to be genuine when compared with other signatures in the possession of the house, and as there was no possible doubt about the attorney's financial solvency, the check was accepted and the stranger took his ring and departed.

An hour later the manager of a big barber shop across the street came into the jewelry store to have them place valuation on a ring. He was referred to the salesman who had just made the five hundred and fifty dollar diamond ring sale, and who immediately identified the ring as the one he had just sold.

Inquiry by the now suspicious salesman devel-

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oped the fact that a well-dressed stranger had offered this ring to the manager for one hundred dollars a few moments before. He had told a story about being called suddenly out of town for the week-end and not having sufficient ready cash. The banks were closed. Most of his acquaintances were out of town. He had just purchased this ring from the jewelry firm across the street, but would be glad to sacrifice it for a hundred dollars in order to get ready money at once. The manager could, if he wished, confirm the stranger's statement about the purchase by stepping across the street to the jeweler's and inquiring.

Here were ample grounds for active suspicion. The heads of the jewelry firm held hasty consultation. Obviously something must be wrong with the five hundred dollar check drawn to "cash," or something crooked about the person who presented it and then offered his purchase for a fraction of its value. It looked like coarse work—a clumsy way of cashing in a bad check.

Fervid activity in the jewelry store followed immediately. The signature on the check was again scanned and compared with other signatures. It appeared to be genuine. The bank on which the check was drawn was closed until Monday morning; nobody there but the watch-

man. So the disagreeable alternative remained of calling up the attorney who had signed the check. His secretary replied that he was spending the week-end out of town.

One last resource—the handwriting expert. His office was in the same block; and after comparing the signature on the check with several other signatures, he declared emphatically that the signature was genuine and the check all right. Of course payment on it may have been stopped, and things like that. And, anyhow, why should any honest person offer a ring for a trifling sum on a ridiculously flimsy excuse?

Ten minutes later the well-dressed stranger, calmly reading a newspaper in the barber shop, was invited by two equally well-dressed gentlemen who wore badges under their lapels, to motor with them in their waiting conveyance to the jail *via* the Station House.

The guest of this party was unperturbed but emphatic—emphatic in his statements that the check was O.K., that the purchase of the ring was perfectly legitimate, that the reason given for making the sacrifice in selling the ring was an entirely honest one. He even showed a telegram received only a few moments before calling him out of town. Indeed, he was convincing—that is, almost. But not enough to cause the jewelry

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firm to rescind its complaint. And, of course, even less so in its effect upon the rubicund and uniformed representative of the law guarding the back exit to the hurry-up wagon as it jolted and dodged through the traffic toward Headquarters.

At the Station House the finger print and Bertillon records proved un-helpful. In their exacting balance the stranger was weighed and found wanting.

"You're a wise guy, to have kept your mug out of print so long," Sergeant Casey assured the prisoner, patronizingly. "But you're goin' on record now, mug an' all."

At which the well-groomed prisoner smiled amiably, and requested the privilege of sending his regrets by telegram in reply to the wire he had received containing the week-end invitation which, he claimed, had precipitated all the trouble. The request was granted and the message sent. Also it was returned marked "undelivered" to police headquarters a few hours later—precisely as Sergeant Casey knew it would be.

And so the stranger spent Saturday night, and Sunday, and Sunday night, at the County's expense in the County's well-known and perfectly dependable hostelry as a "guest." And, as such, he smoked and read and chatted with his

fellow delinquents waiting for the opening of court (and the bank) on Monday morning.

Both institutions opened at precisely the same hour, ten o'clock. And at that hour a messenger from the jewelry firm presented a check at the cashier's window, made out to "cash" and endorsed by the gentleman now a resident in the county jail. The cashier scrutinized the check, made inquiries, and pronounced it a perfectly good piece of paper on which he was willing to advance five hundred dollars of his Uncle Samuel's excellent money.

The messenger returned hurriedly to his employers. And they, even more hurriedly, got into communication with the attorney who had signed this check." "Did he know anything about this check?"

Most certainly he did, came the reply over the wire. He had given it to his good friend So-and-So (the name now endorsed on its back) for services rendered and with which said friend intended to purchase a ring. What about it?

What about it, indeed? Very much about it, and even more! Very much more about it, in fact, than the firm had feared, when that same afternoon the well-dressed stranger of the diamond ring purchase, and his friend, the attorney, conferred with the firm of jewelers and

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gave them the option of paying fifteen thousand dollars in good cash, or standing a suit for fifty thousand dollars damages! One may not cause the arrest and imprisonment of an innocent and free-born American citizen without paying the fiddler for his entertainment. Also, no downtown firm of leading jewelers can jeopardize its standing with its fastidious customers by allowing such a mistake to become known, even though the price of secrecy is high and exacting.

So the firm regretfully handed over its check. And a few hours later Sergeant Casey sauntered into the establishment, removing his cap as he passed majestically down the aisle, not from deference, but because of the heat. He sought the desk in the sanctum of his old acquaintance, the manager, replacing his cap at its wonted angle as he entered and stood, resting his elbow in easy familiarity on the solid mahogany top. His rufescent Hibernian smile contrasted strongly with the somewhat pallid expression of resigned Christian sacrifice that pervaded the managerial countenance.

"It was the smoothest deal I ever saw pulled, and a new one on me," mused Sergeant Casey. "And to think I thought he was a raw piker, while he was sitting there comfortably in the cooler, drawing four hundred and sixteen dol-

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lars an hour of perfectly sure money without the chance of a come-back! I wonder which one of them two birds thought of it first."

The sergeant removed his cap and slowly mopped his perspiring forehead.

"I almost wish I'd thought of it first, myself," he said, pensively.

A DOUBTFUL PISTOL EXPERT

In the cross-examination tilts between attorneys and experts the score of telling shots averages up about fifty-fifty, as a rule. Sometimes a little act, trivial in itself, is more effective than verbal bombardments. His Honor, Charles Fricke, then a prosecuting attorney, once used such a method to show the jury that an alleged expert was neither expert nor honest.

The case was one in which an automatic Mauser pistol played an important part. A well-groomed foreigner had given damaging testimony as a firearms expert. Indeed, he asserted that he had been a small-arms expert for a certain foreign government during the late war, and that part of an officer's equipment in the army of this particular foreign government was a Mauser pistol. The witness' testimony about Mauser pistols, therefore, was ostensibly founded on wide experience and precise knowledge.

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Now, in working out the details of this case and as a result of his knowledge of firearms, Fricke was led to suspect the honesty of the qualifications of this foreign small-arms expert. Some of the witness' statements made the attorney doubt the expert's alleged experience. He had a hunch that the man really had very little knowledge of firearms and was a false witness. So, in the most casual manner, he made a specific test. If it failed to work, no one would be the wiser.

Picking up the Mauser pistol which was "Exhibit A" in the evidence, Fricke opened the unloaded weapon by pulling back the mechanism of control, and handed the weapon to the witness. The pistol remained conspicuously open as all Mausers, and most other automatics, do when cocked and unloaded.

"That is a Mauser pistol that you hold in your hand, is it not?" the attorney inquired, casually.

The witness answered in the affirmative.

"And this is the type of Mauser pistol that was used by the army in which you were a small-arms expert, is it not?" the attorney pursued. The witness admitted that such was the case.

"Would you mind closing that pistol for me?" the attorney queried, in the most off-hand manner.

The witness attempted to comply with the

request. He fumbled, and twisted, pulled and pried at the weapon, and still it remained obstinately open. The witness' face reddened and he perspired freely, either from embarrassment or because of his exertions, as he fumbled futilely with the pistol. At last he gave it up.

"This pistol is out of order," he said. "It is jammed and cannot be closed."

Without the slightest change of countenance, the attorney reached for the weapon, glanced at it, and handed it to his assistant standing beside him, remarking simply:

"Mr. Wells, will you kindly close that pistol?"

And Mr. Wells, in possession of the simple knowledge which the "expert" did not possess, but which every man with even a casual acquaintance with Mausers does, merely loosened the magazine of the pistol, as is necessary for the closing of every Mauser pistol, and the weapon snapped shut. All this in obtrusively plain sight of the jury.

"In perfect working order, Mr. Fricke," the assistant replied. "Absolutely perfect in every way."

"That is all," Fricke said to the witness. And that was "all" in the opinion of the members of the jury, also, as shown by their verdict a few hours later.

CHAPTER XV

BY A TURN OF THE CARD

IN THE administration of justice, detectives are a necessity. It would be impossible to keep the peace and maintain order without them. And yet, in practical law court procedure, there is a tendency to look askance at the unsupported testimony of any professional detective.

This attitude is often entirely unjust. But the very nature of detective work lays its followers open to suspicion. Thus the function of a detective is to get evidence. And his usefulness is directly dependent upon his getting it. Wherefore, dishonest detectives sometimes obtain "evidence" which does not really exist. It is a case of making bricks without straw. And since the entire structure of justice is a tottery affair when constructed of such units, it is a natural tendency to discredit all material emanating from such a professional source of supply.

The possibility of the existence of these defective bricks of evidence is never lost sight of by the skillful attorney. Frequently he takes advantage of it for the artful deflection of justice in his client's favor. Witness the case of little

BY A TURN OF THE CARD

Mrs. Wing Foo, the folded playing card, and the bit of contraband opium gum.

In the old days, before the opium traffic had stolen most of the spotlight as next-to-the-greatest of all evils, the forbidden gum was distributed largely through the agency of the Orientals. "Peddling" had not risen to its present state of magnificence. Most of the peddlers of that period were Chinamen.

At that time the unit of retail traffic was the "card." And this "card" was simply an ordinary playing card folded neatly once, face outward, enclosing a small bit of gum opium. The retail price of the card was one dollar.

Just why playing cards were used for wrapping the bit of opium gum is a mystery of the Orient. From a Western point of view, any bit of paper would have answered the purpose just as well. The Oriental thought otherwise. He must use playing cards for his traffic, and no other medium would serve. And each playing card must be folded precisely across the center, with edges exactly even, so that when thus held together by the sticky opium, one might see the color and know the denomination of the card at a glance, but was given no clue to the type of design on its back.

Now, since color and denomination of the card

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had no significance in the opium trade, one cannot understand why the card was always folded face outward instead of the reverse, on occasion. But it never was. And very fortunately, too, in the case of little Mrs. Wing Foo at the time that two well-dressed strangers came to her house, purchased and paid for a card. Following which they revealed peculiarly shaped pieces of bright metal concealed under their coat lapels, and then sent Mrs. Foo to jail in the ominous black wagon.

After the wagon had rolled away, the detectives searched her house thoroughly. And "thoroughly" is a very mildly descriptive term as applied to such "searches." Yet they found nothing contraband. The nearest approach to it was a collection of twenty brand new packs of playing cards. So these, with the one folded card containing the opium gum, were seized and taken away to be used as evidence at the time of the trial of little Mrs. Wing Foo.

Followed almost immediately certain activities in the Celestial Colony. Little Mrs. Wing Foo had influential friends, and wealthy. And presently word was brought her in the jail that arrangements had been completed to have her case in court defended by the "miracle man," Attorney Paul Schenck.

Immediately, on the receipt of this news,

there was a rise in value of Mrs. Foo's stock in the estimation of her jail associates. Anyone whom Paul condescended to defend must be a "personage," nothing less. Paul, the tall and broad shouldered, of the big hat and flowing, wavy hair! Paul, the dignified, learned, whose silver tongue had more than once held spellbound the blindfolded Miss Justice. No wonder little Mrs. Wing Foo was an object of envy in that cloistered society.

And yet, the tiny defendant, until the very hour of trial, had never seen her distinguished champion. To be sure, one of his assistants visited her and asked her a few curt questions. But Paul himself remained merely a name to the little woman until she found herself seated beside him at the counsel table on the morning of the trial.

The big attorney found favor in the eyes of the petite defendant, who sat at his elbow smiling the enigmatic little smile of the Orient, which no white man may fathom or ever completely understand. And her confidence still held through the monotonous process of choosing the jury, though her champion uttered no word of comment or protest despite the volubility of his legal opponent. Even when the first of the accusing detectives had finished his long story of finding the opium card and the packs of playing

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cards, and Paul had declined to comment on the testimony, dismissing the witness with a shrug and a wave of the hand, and the simple words, "No questions," the enigmatic smile of little Mrs. Foo persisted. It persisted when Paul showed the same indifference to each succeeding witness against his client, and offered no witnesses of his own.

Possibly the poise and assurance in the attitude of her big attorney restrained the misgivings of the tiny Celestial woman when the whole tide of events seemed to turn against her. Not so her stolid faced countrymen, who thronged the courtroom as spectators. Many of them were convinced that they had been sold outright to the enemy. For, as matters stood, the jury had heard an undisputed story of the finding of the contraband packet of opium in Mrs. Wing Foo's possession, and the packs of unopened playing cards, most suggestive. And no one had disputed or challenged these statements.

Even the prosecuting attorney was puzzled. For usually Paul took special toll in harrying witnesses, leading them deftly into verbal pitfalls, tripping them into contradiction. But now he waived this privilege. And yet he smiled the little smile of confidence as he began his address to the jury.

As he talked, he opened the new packs of cards one by one, placing each pack face downward on the table directly in front of the jury. He spoke first of the credibility of witnesses in general, and of professional detectives in particular. As he opened pack after pack, he moralized upon the evils of human cupidity, and offered the suggestion that sometimes seemingly authentic evidence was really purposefully created.

"Evidence, you know, is the life of trade—in some callings," he suggested, as he finished opening the last pack, and spread the cards along the table.

And now he asked the jury to note particularly that the backs of all the cards of these twenty packs were of the same pattern, criss-crossed straight lines of varied colors.

"But," said he, picking up the opium card and turning it from side to side for inspection, "none of you has seen the back of this card. Perhaps it corresponds with these other cards. Or, perhaps"—with a little shrug—"the person who made up this card was not familiar with the pattern on these backs."

He paused a moment, to allow his implication full time for absorption. He had already discussed the practice of obtaining evidence through the medium of prepared "plants." Then, holding

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the card at arm's length toward the jury, the embodiment of persuasive sincerity, he said:

"If the pattern of this card corresponds to the backs of the twenty packs that are said to have been found in my client's possession, I ask you to bring in a verdict of guilty. If not—"

He unfolded the card and displayed its back for the first time—a card of the "Steamboat" brand, a pattern utterly unlike those of the cards on the table before him.

An hour later Mrs. Wing Foo, still wearing the enigmatic little smile of the Orient that no white man may fathom or ever completely understand, pattered out of the courtroom at the elbow of her tall attorney. He, too, was smiling just a little—the wrinkling smile of the Occident, also enigmatic.

As they passed through the lines of smiling Celestials, the little woman formulated a question, turning her head so as to look into the towering face above her.

"And it is all over, no more jail, Mr. Paul?" she inquired.

"Yes, indeed, all over—no more jail," he assured her. "You can go home."

They passed through the long corridor, down the steps, and along the walk to the corner of the block where little Mrs. Wing Foo would turn to

the right and trip her way to the winding alleys of the City as she knew it. And the big attorney would turn to the left into the straight rows of palatial office buildings—the other extreme of the world, as he knew it.

But before turning to the left the attorney paused, doffed the broad-brimmed hat with a courteous sweep, and, smiling, extended his hand to his diminutive client. As he did so, Mrs. Wing Foo's little enigmatic smile broadened into one of deeper comprehension—one that even an occidental might understand.

"Wasn't it lucky, Mr. Paul," she said, "that I used the last card of that old pack before beginning on those new ones?"

DOPE, THE BLACKMAILERS "RIGHT AND
LEFT BARREL"

The fact that newspapers seem willing to print almost anything that will attract attention regardless—this, and the utter foolishness and inadequacy of many of our laws—make blackmail, or, more accurately, attempted or threatened blackmail, essentially an American weapon. No other countries have newspapers like our own, and none have such a multiplicity of badly administered laws. It is this, and the fact that certain subjects directly involving physicians are

"on the taboo and possible blackmail list" in the public mind, that leads to much injustice to medical men.

Thus, the subject of "dope" is a fertile source of blackmail, and attempted blackmail. Not because the subject itself is of any such inherent importance socially speaking, or criminally, as most people are led to believe from the headlines, but because a mere suggestion of any connection whatever with morphine, legitimate or otherwise, immediately condemns the accused, whatever the facts. The simple word "dope" (which, by the way, means anything from headache powders to rattlesnake venom to the public) causes a throwing up of hands and a solemn shaking of heads among the great mass of the unanointed. And yet, opium and its products are the most useful drugs in medicine, are absolutely necessary to the progress and happiness of civilization.

Despite this accepted fact, however, one has merely to point the finger of suspicion to get results. Unscrupulous officers and blackmailers know this. And many an honest physician's reputation, and at least one or two physicians of national reputation, have had those reputations and their lives blasted simply by the black digit of suspicion pointed either in malice or pernicious ignorance.

The late Dr. Ernest Bishop, a physician of earned national reputation, was hastened to his grave by one of those pernicious black fingers. Yet he was scrupulously honest and absolutely innocent.

However, this "dope" subject, with its inevitable kick, has also a come-back occasionally. Thus, not long ago, a certain attorney, knowing that the physician on the witness stand had had considerable experience in the handling of narcotic addicts, attempted to cast some suspicion upon the doctor's character. He was aware that in such cases, all that is necessary is to raise even the tiniest cloud of suspicion without actually proving or establishing anything. So he began:

"Now, Doctor, you have had considerable experience with dope takers—are pretty well versed in this subject of narcotics, are you not?"

The doctor, an old timer, sensed what was coming, but happened to have a few extra poisoned arrows in his own quiver. "Well," he said, leaning forward and looking meaningly at the attorney, "*you* ought to know about dope, and dope-taking, if *any* one does, I should say."

The implication in the physician's attitude, abetted by the "touchiness" of the subject itself, immediately shifted the burden of suspicion.

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"What do you mean by *that*?" the attorney flashed.

The doctor simply smiled, with a shoulder shrug of implication. "*You* know very well what I mean," he said.

That ended this particular line of cross-examination. But it left an impression upon the hearers that the doctor "had something on" the attorney, instead of *vice versa*. The attorney was taking advantage of the taboo subject, "dope," to make an insinuation, and the doctor simply returned the compliment—with interest.

CHAPTER XVI

THOU SHALT NOT BEAR FALSE WITNESS

THE assassin is the vilest of criminals—all varieties of him. Whether he merely attacks the body, or sinks to the abysmal depths of stabbing the soul and reputation, it is all one—the creature is unfit for decent human society.

The slithering reptile who bears false witness against anyone, and the accomplices of a “frame up” or “plant” are of assassin timber. There should be a uniform penalty for these offenses—uniform in its ultimate results, at least, regardless of the peculiar mechanism employed to accomplish it.

Such laws as the national, and sectional, alcohol and opium enactments, and all similar “thou shalt not” type of personal liberty interference, stimulate this assassin’s “false witness” practice.

There was a time when the United States, of all countries, was considered a nation of fair fighters—they “shot it out in the open” in the West, and “fought it out square-toed” in the

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East. Every man was a man, and had a fair chance in the open. Fighting anyone legally or physically, with poisoned and "planted" evidence was considered "Oriental," essentially *un-American*. And we were proud of ourselves and our methods—and the results.

To-day, thanks to our attempts to legislate against personal vices as if such things were crimes—to say what our neighbor shall do with his own personal affairs—the underhanded, despotic legislation of the "plant" and "poison" type, is now "characteristically American," as our European friends remind us.

In short, by fair means or foul, our reformers have attempted to subvert human nature—to do what even the "don'ts of the Decalogue" fail to accomplish. They have applied rack and thumbscrew methods garbed in modern attire, and nicknamed "justice."

And the result? The United States now has the unenviable reputation of being "the most lawless nation in the world"*—the planter of evidence, the bearer of false witness.

On the twenty-sixth day of December, nineteen hundred and twenty-four, at El Centro in the marvelous Imperial Valley, Jim Calhoun shot

*The *Literary Digest* of September 13, 1924.

Gene Hudson—filled him with bird shot. Then Jim hurried into Mexico but a few miles away. And this gave Charlie Gillett, Sheriff of Imperial County, a chance twenty-one days later to prove that the old time spirit of the sheriffs of the great West has not departed. For on that day, in the heart of a Mexican mountain fastness, Charlie, single-handed, captured Jim, and brought him back for trial.

And that trial! It was the kind that divides a community into two factions, for and against. The kind in which Justice wrestles with Prejudice—a contest between politics and principles, rather than persons. For Gene Hudson was a colored man, and Jim Calhoun also, with Indian blood in his veins.

There had been bad blood between Gene Hudson and Jim Calhoun fully two years back. Jim Calhoun was a blacksmith and hunter—blacksmith by trade, hunter from choice. And part of the equipment of his avocation was a pack of valuable thoroughbred hunting hounds. These hounds figure conspicuously in the preliminaries.

One of the amusements of the men in El Centro is coon hunting. A party of congenial spirits will get together, employ some hunter who has a pack of trained hounds, and go with him on a midnight coon hunt along the river bottoms.

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Both Gene Hudson and Jim Calhoun sometimes escorted these parties.

One cold night about two years before the tragedy, a party of young business men engaged Gene to take them on a coon hunt. Gene had no hunting dogs at that time. But Jim Calhoun owned a pack that were boarded out with a friend in the country. And Gene and his white friends drove out and secured these dogs, without mentioning the matter to Jim. And so, something like an hour later, when Jim called for his dogs at their boarding place, he found they were gone.

And naturally he was angry—hopping mad. For it was a cold night—too cold for thin-skinned hunting dogs to work well, and dangerous for them unless especially cared for. Indeed, Gene's hunting party had made the practical discovery that it was a bad night for coon hunting, and were just returning in the darkness to their parked cars, when the righteously wrathful Jim appeared.

What Jim said to Gene on that occasion is now a matter of court record. Generally speaking, it isn't printable. But one remark stands out picturesquely conspicuous: Jim called Gene a "gorilla faced coyote." Following which, and after predicting what would happen if the hound-

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borrowing act was repeated, Jim left for home with his dogs.

Now, there was a deeper significance to that hunting incident than appears on the surface. It was an aftermath of the politics of a recent election, at which Gene and Jim had backed opposing candidates. And Jim's candidate had won.

In El Centro the colored vote is heavy. And, unlike certain places of the old South, this vote is received at par. And so it happens sometimes that the election of a candidate for county office is determined by the vote "east of the tracks." Such was the case in the election in question. This vote had really turned the tide in favor of District Attorney Ernest Utley, who prosecuted Jim Calhoun later, and Sheriff Charlie Gillett, who apprehended him in Mexico. And Jim Calhoun and his wife, Anita, had led the partisan forces to victory at the polls, while Gene Hudson headed the opposition.

However, there was something deeper-seated than politics in the differences between Jim and Gene. For one thing, Gene was the proprietor of a pool hall. So when Jim and Anita Calhoun attempted to open a pool hall close at hand in their own building, they had difficulty with the authorities. It seemed reasonably certain

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that Gene inspired these difficulties. Yet, in the end, the opposition proved futile. And presently, the rival pool hall was prospering close at hand. So that, thus far at least, proprietor Jim and his very capable wife, Anita, had suffered only obstacles, not defeat.

One evening, however, when Anita was making and baking pies and Jim was reading—reading magazines of the big outdoors, I suspect—they had callers. Three representatives of the law dropped in on them. And, after the seemingly wholly unnecessary process of exhibiting a search warrant, these officers proceeded to search the cottage for hidden “booze.” They ransacked for some little time—time enough, indeed, for Anita to complete the baking of the entire lot of pies, as she remembered later when called upon to fix the extent of this official visit. Yet, in the end, the search proved fruitless. The little three-roomed cabin held fast its secret against the vigorous official search.

But this, apparently, is a minor consideration in applied booze legislation. If you don’t find the evidence, well—find it, anyhow. So, on the strength of what they ought to find even though they didn’t the officers arrested Anita and Jim as an earnest, and carted them off to jail.

As Anita and her officer escort entered the

lobby of the jail, the official made this significant remark: "If you had voted '*right*,'" he told her, "you wouldn't be here." And there seemed to be no secret about this statement, as two or three credible persons standing about heard the remark, and so testified later.

But, while an officer was escorting Anita to jail, a brother officer of the booze-search squad was seeking out Gene Hudson. After a time he returned to the Calhoun cottage, went directly to the back porch, and brought forth the "evidence" in pints and quarts.

Later on, a certain colored boy testified that he had secretly placed that bottled evidence there himself—hired to do so for twenty-five dollars by Gene Hudson. He also testified that Gene notified the police. But the boy was over zealous: the officers were unable to find the prepared evidence. So they arrested the Calhouns anyhow. Then an officer conferred with Gene, and Gene conferred with the boy, and then re-conferred with the officer. After which said officer returned to the cabin and walked straight to the cache.

And thus the machinery for exacting "justice" was completed!

For this offense Anita and Jim were placed under bonds, Anita for five thousand dollars,

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Jim for two thousand. And then the culprits were brought for trial, once, twice—"not less than seven times, probably more" as their attorney testified. Yet, in point of fact, not going to trial at all, because their case was purposefully delayed by their accusers, who finally turned things over to the federal authorities. As a result, Anita and Jim made three trips to the federal court in San Diego, a mere matter of one hundred or so miles each way. The minions of the law were playing the delightfully inquisitorial game of keeping the accused on a hot griddle as long as possible—a little game of torture more exquisite and effective than conviction itself.

A total of ten times, then, the Court made its flourish and menace. And then the case was dropped! Why? Probably because of the practical results accomplished: Jim Calhoun had decided to leave the community forever, and Anita was stricken with the fatal malady, diabetes. "The jail was pretty cold," Jim testified later, "and Anita never was well after that."

But after a few months in a Los Angeles hospital, Anita, wrecked in health, returned home to look after her property. Jim remained in Bakersfield, three hundred miles away.

Then came the incident of the "Steppin' High" company of colored performers. The Steppin'

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High troupe were to entertain the people of El Centro "east of the tracks." And in return, the east-siders were to entertain the visitors with a dance. Gene Hudson was to be the master of ceremonies, and the dance and entertainment were to be held in his hall.

So Gene, full of the spirit of the entertainer and proprietor, went about soliciting. And in the course of his solicitations, he came upon a group of young colored men near the railroad tracks during their noon hour. Among them was Benny Anderson, a coach painter.

When Gene Hudson asked these young men if they were going to attend the "Steppin' High" dance, all but Benny asserted that they were. But Benny said that he had to work that evening.

"I didn't expect *you* would come" Gene said to him. "Because you're a friend of Anita's." Then, in language that is unprintable—language too vile to repeat even at the trial—Gene said things about Anita.

Benny retorted by asserting that he was going to repeat the conversation to Calhoun when he returned, and asked Gene if he was willing to "face Jim" in the matter. Gene assured Benny that he was quite willing. This, in the presence of several witnesses.

And in the meanwhile Anita's health continued

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to fail. While Jim remained in Bakersfield three hundred miles away, getting ready to "raise cotton next season." But as Christmas approached, Anita wrote and begged her husband to come for the Holidays. And Jim responded in person a few days before Christmas. He found Anita a very sick woman, indeed.

The morning after Christmas, Jim started up the street in his car to get some gasoline. Half a mile from his house he ran across a colored man named Bills and drew up to the curb. Bills had had experience raising cotton and Jim wished to employ him. So they talked for a few moments.

And while they were talking, Gene Hudson came walking down the street. And Jim, sitting in his car, stopped Gene and asked him about the conversation he had had with Benny Anderson at the time of the "Steppin' High" celebration—asked him if he really had said those things that Benny reported.

Gene made no reply for a moment. Then, with a burst of profanity, he started to draw a big white handled six-gun which he was carrying, gun-man fashion, concealed by the folds of his shirt in his waistband.

Before Gene could draw the weapon, however, the agile Bills threw his arms around him,

pinioning Gene's arms so he could not complete the draw. At the same time Bill shouted for Jim to drive on—get out of the way. Which Jim did. And one tragedy was averted.

Another tragedy was averted also, or at least postponed, when Jim, returning home to Anita lying in her sick bed, declared that "nothing was the matter." Anita had noticed that Jim was pale; and remembering that he had been sleepless and troubled for several nights, suspected another calamity. But Jim denied it. And presently he took his car and drove to Mexicali, in Mexico, twelve miles away. He had an appointment there with a man to whom he had loaned one of his hunting dogs.

Arrived in Mexicali, Jim bought a pint of tequila (pronounced te-kee'-la), a Mexican whiskey. Mexicali reaps the reward of prohibition without the blessing of the statute. And after Jim had shared his purchase with his friend, still another friend joined the group. This new friend also had a bottle, evidently of Volstead vintage. For one sample shot of the contents which Jim swallowed had the characteristic effect: Jim was found by his friend a few moments later, sick and unconscious on the washroom floor.

He was driven home in his car and put to bed, still unconscious. Volstead's liquids are persist-

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ent as well as vigorous. And he was still sleeping and dazed, at least, in the evening when Gonzolas, an old Mexican laboring man, sought him out. Anita had gone to the Post Office for the evening mail, so at that time the two men were alone in the house.

Gonzolas brought a message of warning to Jim. And Jim thanked him and laid down on the bed again.

But a few minutes later, people living east of the tracks heard seven or eight shots, fired in pairs mostly. And those who hurried to the scene, found the body of Gene Hudson riddled with bird shot, and Jim Calhoun had disappeared. Twenty-one days later Sheriff Charlie Gillett arrested Jim in the Mexican mountains.

The trial that followed three weeks later in the new El Centro courthouse was worthy of a metropolitan setting. Indeed, there are many metropolitan courts of justice that might well take a leaf from the book of this Calhoun case procedure.

To one habituated to the atmosphere of court-rooms, this El Centro Hall of Justice seemed strikingly different—more in accord with the letter as well as the spirit of the law. The letter of the law, you must bear in mind, holds that the prisoner be considered innocent until proved guilty—proved so beyond reasonable doubt.

Yet, the attitude of most court attaches, and the very atmosphere of most courtrooms, are not consonant with the law's written word. There is usually a "court-atmosphere" which obtrudes the impression that a thoroughly guilty criminal is about to get his desserts, rather than that an innocent man is to have an impartial investigation of his innocence.

But perhaps this is because courts for the most part are held in cities; and the spirit of the city is one of suspicion, in contrast to the open-minded frankness of the great Western frontier spaces. Be that as it may, in this El Centro court setting, the sinister atmosphere was wanting, although there was nothing lacking in courtroom dignity or in the rectangular rules of austere court procedure.

Everybody seemed on friendly terms with everybody else—the friendliness of the west, not familiarity. The suggestion of tragedy seemed lacking, at least until the bailiff brought in a padded and cushioned easy chair and placed it beside the seat reserved for the accused. It was for Anita, whose stricken body required artificial padding. And when Anita, assisted, took her place in this seat, the weariness of her body portending the weary days to come, the sinister note seemed out of harmony.

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In contrast to Anita's palsied entrance was that of prisoner Jim, the debonair. Not offensively or intentionally so, but with the complacent natural dignity of the large, athletic man. His olive skin suggested northern Italy, and his clear chiseled features were Caucasian or Iroquois. Not the manacled, closely guarded, cringing creature one associates with courtrooms and murder trials; but an erect, manly figure, who entered the room unattended, gently kissed his wife, and took his seat beside her. The absence of obtrusive weapons, and officious court minions, featured this remarkable court setting.

In the trial that followed, three incidents stand out conspicuously: The testimony of Anita; the testimony of Jim; and the testimony of Gonzolas, the old Mexican. Anita's testimony came first.

"Will you take the stand please, Anita?" her lawyer, Ed Hervey requested. And, please note that he used the given name, as did also Ernest Utley, the prosecutor, in addressing most of the witnesses—a touch of neighborly acquaintanceship, which marks "where the West begins." And Anita, assisted from her chair, made her way slowly to the witness stand, steadying herself with her left hand while she raised her right to take the oath. Then she settled herself on the leather cushion for the ordeal.

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In response to questions she retold the incidents leading to the final tragedy—her activity in the campaign to elect the District Attorney; the insinuations about her; the incident of the “planted liquor;” her experience with the officials and at the jail.

“You knew the stories being circulated about your character?” lawyer Hervey asked. “Did you talk with Jim about these things?”

“No,” Anita stated, with a slow shake of the head. “No,—I told him everything, everything—but *that*.”

She dropped her eyes; but the attorney persisted.

“You told him everything—but *that*? Tell me, Anita, since it was not true, why did you not tell him—that?”

Anita slowly raised her eyes to meet those of her attorney, unwavering, with just a suggestion of suppressed emotion. “I love my husband,” she said; “and I could not tell him that. Because, when there is any suspicion—even just a *suspicion*—well, the home is never the same after that.”

A moment of tense silence followed. You could feel the truth of her statement. Then her attorney persisted:

“And now, Anita, I must, for the sake of the

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record, ask you this question—and you will understand that it is my only reason for asking it: “Who was this white man about whom these lies had been linked with your name?”

A surprised expression of distress flashed over Anita’s face. She had not expected that question. Then she leaned forward a little and in a voice slightly lowered, with a simple gesture indicating the District Attorney sitting directly in front of her, she said: “It was Mr. Utley, here—the District Attorney!”

The situation was almost too improbable for fiction. Ernest Utley, District Attorney, thanks, in part at least, to the campaign activities of Anita and her husband, was now attempting to place the noose about the neck of this husband who had been goaded into killing the very man who had opposed Utley’s candidacy. It was one of those queer pranks of Fate wherein duty places an individual in the paradoxical position of seeming to turn traitor—“the most distressing and distasteful task in Ernest Utley’s active career,” as Attorney Hervey explained to the jury in his closing address. Distressing, because the accusation was false. And everyone—even the accused prisoner—could express nothing but approbation for his action. Admiration, too, for the man at that dramatic moment when

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Anita made her statement—admiration for the dignified acceptance of a most distressing situation.

And now Jim was called to the witness stand. With a quiet assurance—a dignity that is inborn, that cannot be assumed or acquired—he walked to the witness stand and raised his hand for the oath. Then, in a firm but modulated voice, he began the routine of answers.

Was he on trial for his life? No one could have guessed it—or suspected it. If he were acting, it was an effort worthy of an Irving or a Mansfield. As far as manner or inflection indicated, Jim Calhoun might have been narrating the incidents of some hunting experience. There was no studied indifference—no real indifference. Indeed, one felt the tremendous volume of repressed emotion in the quiet answers of this quiet, dignified prisoner.

Step by step his attorney led him through the maze of preliminary testimony, with now and then a spark of illumination. Thus, when questioned about what the young man, Benny Anderson, had told him a few hours before the tragedy, Jim had mentioned that the boy addressed him as, "Uncle Jim."

"And are you really his uncle?" Attorney Hervey asked.

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"No, he is no relation," Jim admitted. And then he added, with just the trace of a smile: "Some of the boys call me 'Uncle Jim,' you see."

A man who "some of the boys" call "Uncle" is not usually of assassin timber.

Only on one occasion did the suppressed emotion slip by the barrier. And then only for an instant. Under questioning, Jim had related the incident of Gene and the white handled revolver which Bills, the colored man, had interrupted by throwing his arms about Jim's assailant. Jim had related that he returned home following this incident, and how Anita had detected unusual trouble written on his face. She had questioned him about it, and he had denied it.

"Did you tell Anita that Gene had tried to kill you that morning?" Attorney Hervey asked. And Jim had replied in the negative.

"And why did you not tell her?" Hervey persisted.

"Well, you see," Jim began, with the only trace of hesitancy in all his testimony—"You see, Anita was not well—she had been sick a long time—and I thought if I told her it would worry her—make her worse." And for a moment he looked out of the window into space, with just a suggestive flicker of the eyelids. But only for a

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moment. Then followed the story leading up to the tragedy.

Bear in mind that the defense in this case was "temporary insanity." And also, you should know, that in many cases this defense is one of those permissible legal pleasantries, analogous to the childish game of cross-tag, in which the player is permitted to do all manner of things so long as he keeps his fingers crossed. The plea of temporary insanity permits the attorney to introduce a great many little side issues that may influence the jury tremendously. The jury, you see, can use its commonsense even though the law may not.

"Do you think he is crazy?" I whispered to a rotund spectator beside me. He answered me with a scornful curl of the lip.

"Well, do you think he is guilty?" I persisted. The portly man assumed a friendly expression and leaned toward me confidentially, with one eye on the bailiff. "I hope so," he whispered—"I sure do hope so," he confided, with a leer.

And now the old Mexican, Gonzolas, took the stand, the last witness for the defense. Logically, his testimony should have preceded that of Anita and Jim. But until now the searchers had been unable to locate the old fellow. Could it be that the defense lawyers purposely failed to locate

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him? If so, they used good judgment—showed a true dramatic instinct.

In substance, Gonzolas told the story of how on the night of the tragedy, and only a few minutes preceding it, Gene Hudson had stopped him and tried to make a bargain with him. The gist of this conversation was that Gene requested Gonzolas to go to Jim Calhoun and hire him to take the Mexican to Mexicali, just across the border. Gonzolas was to arrange to meet Jim at the brick yard on the outskirts of the town. And Gene had told Gonzolas, in effect: "And I'll be at the brick yard. I'm going to kill that —— half-breed!

But Gonzolas had protested: "Oh, no, Mr. Gene, I not do that. I friend to both you boys," he refused. And then, as he walked away, Gene called out to him, as he quoted: "You no say anything about this, I give you fifty dollars."

It was then that Gonzolas made his way directly to Jim's house in a friendly capacity. He found Jim alone, asleep on the bed, but dressed. Anita had gone to the Post Office for the mail. "Mr. Jim," Gonzolas began, rousing the sleeping man by shaking him; "Mr. Jim, you stay in the house tonight. A man, he goin' to kill you."

Jim sat up in bed, rubbing his eyes. "Thank

you, Gonzolas, thank you," he said. But Gonzolas was not sure he understood. "You know what I say?" he persisted. "You stay in the house tonight. A man, he goin' to kill you."

Jim looked at the old Mexican, still only half wakened. "Who," he asked. "Who is going to kill me?"

"Gene Hudson," Gonzolas told him. "He going to kill you. You stay in the house."

"Thank you," Jim repeated, as Gonzolas left the room. And a few minutes later came the report of seven or eight shots. And shortly after, Gene Hudson's body was found riddled with bird shot.

Generally speaking, judged by results at least and in the opinion of the ordinary layman, the impassioned plea of a defense attorney for his client has little effect upon a jury's decision. Occasionally there is an exception. And in this case the effect of boyish young Ed Hervey was all this.

But his was not the last word. The District Attorney has that. And Ernest Utley, also young, and also keen and alert, used one of his opportunities.

When Hervey finished speaking, the portly gentleman sitting next to me leaned over and whispered confidentially: "Hell, he *ought* to have shot him—with buckshot."

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But as young Utley progressed in the building of his picture I sensed a changing attitude in my neighbor—one of doubt. And when Utley finished speaking, he leaned toward me, shaking his head. "I don't know," he whispered, dubiously. "Darned if I know—I'd hate to be a juror in this case."

And the final score reflected the mental attitude of this portly neighbor. For the first jury stood fifty-fifty—six for acquittal, six for conviction. And the next jury, under lock and key for almost three days and nights, compromised on the verdict of manslaughter, with a recommendation of clemency—a penalty of from one to ten years.

CHAPTER XVII

THE LAW AND THE PROFITS

DOCTORS will testify to *anything*," a New York lawyer once declared. He was an attorney, and perhaps he was judging our profession by his own.

But, anyhow, if we judge things alone by newspaper accounts—the "battle of the experts," and the like in all important murder trials, the disagreements between "experts" in most "compensation" cases, etc., etc.,—we find it very difficult not to agree with the statement of the N. Y. attorney.

But things often look very different from the inside—the place usually forbidden to the public. And yet, curiously enough, the newspapers often know this "inside" to the farthest corner; but, for one reason or another, they seldom put it into print.

About ten years ago, when women were first admitted to jury duty, the matter of judgment about the influence of the "expert" witness was one of the arguments against the system. Women, it was argued, were too sentimental, too likely to be swayed by the blandishments of the

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skillful lawyer. Also, too tender-hearted and emotional to pass correct judgment in cases where life and death was concerned.

Yet the very first important case settled both these points decisively. It was the Harold Denman case in which one lone woman sat with her eleven male associates in the jury and passed judgment.

It happened that I was a pinch-hitter alienist on this case, called by the State which was represented by former Mayor Cryer, then the chief of the District Attorney's staff, of Los Angeles.

The Denman case, as those who follow those things will remember, occurred just after the United States entered the World War. Three or four young soldier boys, deserters from one of the nearby cantonments, hauled a passing pedestrian into their car, robbed him, rode about with him for awhile, then shot him to death and dumped his body out onto the highway. Evidence showed conclusively that young Denman had done the shooting.

In the trial that followed it is on record that the jury of eleven men and one woman—the first “mixed” jury that ever passed judgment in a murder case, I believe—found the boy guilty of murder in the first degree—found it quickly and certainly. The verdict carried the death penalty.

All this may be readily understood: There are other things that were more enigmatical. Thus, Denman was defended by "the most remarkable array of counsel that ever defended a case in Los Angeles," to quote the newspapers. Yet Denman was penniless, his people poor, and the case not one to excite public sympathy. How, then, did it happen that such nationally known attorneys as Paul Schenck, the late Earl Rogers, and Frank Dominguez, with some lesser satellites, acted as defense counsel? "Money must be coming from somewhere to retain those birds," as the wise old bailiff told me. Anyone could see that. Whence the source of the golden flood?

The lawyers had spent weeks in preparing the case, and weeks in trying it. After which the jury returned a verdict of guilty on the first ballot, the kindly first-woman-juror voting the extreme penalty with the rest. Following this, Paul Schenck spent still more weeks and tireless effort, in having the penalty reduced to life imprisonment. For which he asked and received—nothing. His services were given voluntarily, as were those of Frank Dominguez, out of friendship for Rogers, who in turn had accepted a mere tithe of his usual fee to defend this soldier boy—largely a matter of sentiment, I think, since the great attorney's own boy was, at that time,

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"flying over the trenches in France and dropping bombs on the German invaders."

And the "fabulous fee" pressed upon the alienist as compensation for the cuts and manglings in the legal arena? It was War Time, and War Time prices prevailed. Twenty-five dollars for the day was the handsome amount finally allowed by the Board of Supervisors, with the earnest approval of Attorney Cryer.

THE SUPREME PENALTY

However, things seemed to be looking up in the financial world a little later. The convicted murderer, Wolfgang, breaking all precedent after the jury's verdict, proceeded to "throw a fit of insanity"—a real one. Indeed, the attack was so obviously genuine that even the doubly hard-boiled jailers were constrained to send the man to the "crazy ward" in the hospital. Which, of itself, is evidence enough.

Wolfgang, an old German laborer of the moron grade, had shot and killed a policeman, in an altercation over a stolen bottle of milk. Following which he was tried and convicted by a jury in the court of Judge Paul J. McCormick, now of the Federal Bench. The question of insanity was not raised.

But, almost before the ink on the verdict was

dry, most unexpectedly and inconveniently, Wolfgang proceeded to have a real attack of actual insanity, and no mistake. It resulted in a most unusual situation. Legally, of course, the Judge could not pronounce sentence, the death penalty, upon an insane man. Such a thing is not only intrinsically abhorrent, but forbidden by law. And here was Wolfgang gone stark mad!

To meet this situation, Judge McCormick took what would seem to be the most sensible course open to him. He asked three alienists to examine the man. Which, it transpired later, was not a legal procedure at all, merely a commonsense one.

However, the Judge used his common sense, even though illegally. The alienists selected were Dr. Henry G. Brainerd, a national figure in psychiatry, Dr. Martin G. Carter, helmsman of the Psychopathic Hospital, and myself.

Meanwhile, however, without "expectancy" and almost without precedent, the raving Wolfgang suddenly "snapped out of it"—became absolutely sane, after three short days of maniacal delirium. A proceeding quite as unusual and unexpected as the sudden attack. It is the sort of thing that often appears in fiction, but seldom in medical annals.

And so, when the three alienists examined the man's mental state, they found no evidence of an

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insane and legally irresponsible person, simply a childish, grouchy, old half-wit—two-thirds-wit, to be generous. And the law does not excuse from crime even the two-thirds witted.

The true psychology of magistrates on the bench is not well understood by the general public—certain types of magistrates, at least. To the public, the judge is a solemn, emotionless, adamant kind of unhuman animal, who doles out death or other legal sentences irrespective. Between times he sits in mirthless, sinister contemplation in his cloistered study. An owl, if you please, lacking the horns but plus the actual wisdom. To him all human beings look alike—most of them guilty. Wherefore it is something of a pleasure to send them to their well-deserved punishment.

Such is the popular idea. In point of fact, no picture could be more completely out of drawing. The throes of agony suffered by the conscientious type of magistrate over the possibility of a mistake that would jeopardize or snuff out a human life, is incalculable. And Judge McCormick is of that type. Also, he had at one time been the presiding judge of the Lunacy Court, where he had come into daily contact with mental patients, and had a sympathetic understanding. As a result, he knew that an exact determination

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of the actual degree of insanity in any given case is often impossible. Hence his Honor's state of mind when confronted by the necessity of sentencing this old man to hang. For, curiously enough, although the Judge had been on the Bench many years; and before that time had been an ardent prosecutor in the District Attorney's office, he had never come directly in contact with a case demanding the law's supreme penalty.

It was, therefore, undoubtedly with regret that he received our joint report that Wolfgang was a sane man. But, as in duty bound, he again set the day for pronouncing sentence. He had been notified by the Public Defender, now Judge Aggeler of the Superior Court, that he would on that day present arguments for a new trial.

When the day arrived, at an early hour before the time for opening court, each of us alienists received a personal telephone call from His Honor, asking us to be present in court. It was a request, not a summons; and the Judge did not explain just why our presence was desired. So we were on hand, sitting in puzzled patience, while Attorney Aggeler presented his carefully prepared arguments.

It was an intensive process, dull and monotonous as the hours dragged by, particularly to

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three active physicians who found scant consolation in the thought of broken appointments with disappointed patients. It had the tedium of monotonous legal verbiage. And through it all sat old Wolfgang waiting to be told just when he should hang, trying his best to keep awake and seem interested and pretend to get some idea of what it was all about. But very much more interested, I feel sure, in what he might find in store for him at the noon meal.

However, the old fellow was scarcely more at sea about the reason for his presence there than the three alienists stolidly holding down their very much uncushioned chairs. And, following the noon adjournment, we sought the Judge.

"I wish you would remain in the court room until—we have finished," he urged us, over our mild protests about disappointed patients, our utter uselessness, and other platitudes. Then he added, interpreting the puzzled disappointment in our faces: "You cannot appreciate, gentlemen, what it means to hold the responsibility of a human life in one's hand."

We did know: we were doctors, accustomed daily to just such responsibility. But we did not say so, fully appreciating now the reason for our presence. And for three hours more, until the very closing hours of the court day, we listened to

the somnolent technical arguments of the Defense attorney.

When they were finished, the motion for a new trial was denied. Then, in the waning light of the now hazy court room the prisoner was ordered to stand up to hear his doom. He had been dozing half the time, and was still more asleep than awake I verily believe when the attending bailiff prodded him into a drooping, half standing posture. The real ordeal of those few moments was for the Judge, not the prisoner.

“—— you will be hanged by the neck until you are dead,” His Honor’s voice finished clear, full, without quaver.

But I doubt if he could have added another word.

A few moments later he called us into his chambers and thanked us, regretted that he had taken so much of our time, and instructed us to send in our bills. He would “O.K.” them, and pass them on to the Board of Supervisors, which he did. And a week later they were returned to us intact, accompanied by a courteous letter which explained that, owing to the irregularity of the procedure, etc., etc., they would not be “honored” by their Majesties.

And so we received no recompense? Quite the contrary! We received the gratitude and

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cemented friendship of Honorable Paul J. McCormick—"honorable" not merely in name—a boon of far greater value than could be awarded by any mere Supervising Board.

THE GENUINE BLUEBEARD

And then came "Bluebeard" Watson. Not the fictitious and comparatively gentle old Bluebeard of sharp sword and the numerous disappearing wives, but the queer, weazened, softspoken, slithering old reptile, molded imperfectly along human anatomical lines, who actually killed a round dozen of women (so far as he could recall) besides marrying still another dozen or so before he took up permanent abode in a California penitentiary.

The amazing thing about this most amazing case is the fact that Watson's crimes were not even suspected until he himself confessed them. To be sure, he had been suspected of some money irregularity. But, cleared of this suspicion by official investigation without trial, the authorities were about to turn this old wife-killer loose, when suddenly he confessed—related the most amazing series of crimes recorded in modern annals. Not, however, until he had exacted a promise from District Attorney Woolwine, that he should not pay the supreme penalty.

Without knowledge of the inside facts, it seems astounding that a criminal guilty of a dozen murders and so many bigamies that he had actually lost count, could gain leniency by any process whatsoever. But that is snap judgment, and unjust. The fact is, that had not Woolwine bargained with this man, the criminal would have gone scot free, since there was not a stitch of evidence against him, or even suspicion. So, when this soft spoken, servilent creature approached the attorney with a proposition to confess an important crime at the price of life imprisonment, his action suggested that of the ubiquitous "nut." Woolwine more than half suspected that he was about to be regaled with the kind of fantastic lunatic confession of some imaginary crime that was an every day occurrence in his office.

Indeed, when Bluebeard had outlined his sketchy story of a dozen murders, Woolwine gladly sealed his bargain not to demand the extreme penalty, and sent for the alienists. His suspicion of the man's mental condition had been strengthened by the fact that two deputies dispatched to the spot a few miles away in the desert, where Watson claimed to have buried his last victim, returned without finding any trace of a tragedy—just as they had expected.

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When, however, on the following day Watson himself led the deputies to the place where the body was found as he had described it, things looked different. Possibly old Bluebeard was mad, but he had some things straight, anyhow; and they were the sort of things not to be overlooked. So Attorney Woolwine called the alienists, Dr. Charles L. Allen and myself, and arranged the setting for the official "confession."

And it was some confession! One of the most gruesome, least dramatic recitals in history.

The setting was the District Attorney's office, a large room rather dimly lighted with the gloom increased by a cloudy day outside. There were present just eight persons most of the time, and callers and telephone messages were ruled out. The old prisoner, stooped and sallow, still wearing the bandage about his wound in the neck—a suicidal knife blade thrust when his fate was in doubt—sat in a well-padded reclining chair and made himself comfortable. Then, at the request of the Prosecutor, he began his sing-song narration, paced by the official stenographer.

The man's voice was cringingly low, and his intonation excellent. He was a self-educated man, who had given much attention to the amenities and cultural side of things and was selective in his diction.

"And what became of this woman, this wife?" the Prosecutor would ask after the narrative of each new marriage, keeping careful count of the procession.

"I killed her," Watson would reply in precisely the same manner and with exactly the quality of emotion one would show in saying "I sat down," or "she went home."

"And how did you kill this one?" the Attorney would pursue.

"Oh, I think I struck her with a rock—yes, I am sure it was that way." He was eager that the official records should be scrupulously correct; yet, apparently, when one has married and murdered more than a certain number of times, it is difficult not to jumble or transpose some of the details.

"We were walking beside the lake," Watson would continue, without prompting, "and I struck her with a rock that I held in my hand."

"Were you quarreling?" someone interjected.

"No, no—we were just walking along the shore together, talking. I think I was a little behind her. And I struck her in the back of the head and she fell down partly into the water—her head was beneath the surface, or almost so—and she seemed to be breathing. There was a pole nearby, the branch of a tree, and I placed that

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across her chest, so that she would be under water—her head, at least—for a few moments.” Watson was thorough and workmanlike in everything.

“And what did you do with that body?” someone would prompt. The question was entirely superfluous, but we must find some kind of vent for our own feelings. Watson needed none.

“Well, she had on a very heavy cloak,” he explained. He remembered dresses very well, indeed. “So I put some rocks in her pockets, and I put some inside the coat and buttoned it, and sank it in the lake.” Also he was meticulous in his selection of a proper kind of lake. He used Lake Washington, which is of such depth and low temperature that no body ever rises to the surface.

ENTER, A CHAMPION

It was just at the closing lines of the description of wife number three, if I remember, that a whispered announcement was made to the District Attorney that an especially important visitor was asking an interview with the Bluebeard. A moment later Charlie Chaplin entered.

Immediately all “examinations” were called off, and everyone gathered ’round to absorb this amazingly grotesque interview between the king

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of comedians and the champion wifekiller and most practical matrimonial exponent since King Solomon.

They talked for fifteen minutes. And from the side line it was certainly an interesting preview. Charlie, handsome, dapper, with that obviously diffident but beguiling little smile—so utterly different from the slap-stick Charlie of the screen. And squinty-eyed old Bluebeard, humped in his chair, soft spoken, with a quizzical expression.

In that quarter of an hour they talked in generalities that I do not recall, every day platitudes about nothing in particular. But this I remember: They did not talk “shop.”

It is proverbial, of course, that no one in this world seems to “look the part,” the poet no less than the others. This holds true about great criminals, despite popular opinion to the contrary. And I doubt if the wisest man in the whole world, unoriented, watching and listening to that pair, and given a hundred guesses, would have been able to have placed either of them anywhere near his real category. Certainly not as undisputed “world champions” in diametrically opposite spheres.

I do not know whether the interview affected Charlie, or how much material for comedy he

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may have garnered. But its effect upon old Bluebeard was striking. It perked him up wonderfully. Surely, it takes more than a mere "person" to draw an early morning call from the best known man in all the world! It is flattering. And Watson felt it.

For a few minutes his mental processes speeded up a trifle. He told his fourth murder—which was also a deep lake affair, as I recall—somewhat more fluently than the preceding. Yet by number five, the glamor had waned, and he had dropped back into his drab, sing-song monologue, which varied so little throughout the day.

Only once did he show anything like a symptom approaching an emotion. Not over any mere murder, of course. That was commonplace, everyday stuff. But over a trivial matter—a characteristic that is sometimes diagnostic in mental suspects. It was this:

Somewhere along about wife-murder number five or six it occurred to someone to ask the criminal's right name. It had not been definitely determined before.

Instantly the man's attitude changed. He was apprehensive, furtive. But what about? His fate had been definitely predetermined; nothing he would say or do could change that, and he knew it. What, then?

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Watson explained, in the hesitant, broken voice of real agitation: "When I was a little boy, and had no friends, and everyone seemed mean to me," he told us, "there was an old couple who were good to me. They fed me, and they believed in me. They don't believe I would do anything—wrong, like this. It would break their hearts if they heard that this was—me."

He sat for several minutes in suppressed agitation without speaking, and then added that he would "almost rather be hung" than "hurt these old people's feelings." But, when brought face to face with the assurance that probably he would hang if he did not "come through clean," he yielded, with this queer conscience salve:

"I'll write them myself, all about it," he decided, "and they will understand."

And apparently he really thought they would—would "understand" how their boy could marry "a whole township" of women, and kill off half of them. Which shows, to an alienist at least, a pretty clear symptom of mental obliquity and not a very uncommon one, this distorted evaluation of things.

It took Watson all day to drone his story. And he was only interrupted two or three times, on each occasion by someone trying to get him to admit degeneracy. He had the physical

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peculiarity suggesting this, and the nature of his crimes—the important part we felt sure he did not tell—seemed confirmatory. But the nearest we could get to the truth was an evasive, “I do not think so.” Yet, on the whole, he was amazingly frank, and I believe truthful—that day.

The following day things had changed, however. Watson was less frank. His real ordeal—his great confession, his day in court—was over. And it had been *his* day—not forgetting Charlie’s flattering visit. Now there only remained the comparatively easy and absolutely innocuous examinations by the physicians whose findings would not in any way alter the ultimate decision by the Judge.

So, with a whole night for contemplation, he was prepared and on guard. Evidently the “degenerate” stuff rankled: he did not mind being a murderer. But to have anyone think that he was a really bad man—that touched his pride.

When we visited him in the hospital jail ward, we found he had spent many hours in preparing a written argument for our inspection, an attempt to prove that he was not a degenerate. Which, to most of us, was in itself pretty conclusive evidence to the contrary. Besides which, he was now less frank and obviously evasive—quite a

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different Bluebeard from that of the day before. And perhaps this accounts for the opinion of some of the alienists who examined him that day, but who did not have a chance to see him the day before. In any event, there was not the usual opportunity for partisanship, since all of us were acting for the District Attorney, would receive the same pay, and would not be cross-examined. And yet our opinions stood three to two.

This is illuminative, a suggestion that alienists may be actuated by motives other than mercenary consideration—by honest opinions, for example. Three older and more experienced alienists who saw Watson that first momentous day, agreed that he was abnormal. Two less experienced men, on the following day's examination, disagreed.

And as to the fee of those alienists? An honest computation of the time actually spent in making the examinations and in the court room, revealed that they were paid something over 29 percent more than the regular time bricklayers of that period, but less than the over-time men.

WHY DO EXPERTS DO IT

It is proverbial that juries have little use for experts, particularly alienists. The jury is lack-

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ing in respect for medical opinion; and the feeling is thoroughly reciprocated. The physicians say they have all the best of the argument, since some people can understand some physicians, but nobody can understand any jury.

The doctor is aware of this attitude of the jury. He knows the hostility of the press. And he has at least an average amount of dislike about being roasted by friends, enemies, and neutrals. Wherefore there remains only one explanation of why he will take the stand at all: profit! Anyone can see that this is perfectly simple. Take the "hammer murderess" case as an example. The criminal in question is Clara Phillips, of San Quentin Prison.

Clara's crime came at an inauspicious time, psychologically. The Arthur Burch case had just finished its run of "three innings and no decision," with particularly vituperative attacks upon the defense alienists. The prosecution alienists remained unscathed, as always, since, for some curious reason, the public and press reserve their maledictions for the doctors whose testimony may cheat the hangman. The "hanging doctors" are all right.

"Oh, well," as the old bailiff remarked—the same bailiff who had broken all court records by once believing a notorious prisoner to be innocent

—"when you're up against that thing called fate, you might just as well lie right down and get it over with. And fate sometimes looks like politics."

In any event, a series of recent events had so thoroughly disgusted the local group of alienists, who, curiously enough, are most cordially friendly with one another, that it looked as though the murderers with addled brains were going to be out of luck for a time.

And just then, along came Clara, with her "hammer murder."

It may be recalled that the "hammer" part of the proceedings did not obtrude itself in the beginning. Nor the fact that a woman had committed the crime. It was known only that the body of a young woman had been found terribly mutilated at the side of a lonely road. Those were the gruesome facts. The cause of the murder or the perpetrator was unknown.

However, that state of mutilation itself was significant. Several persons at once recalled that there was an old Roman dictum, "when you find a body unnecessarily mutilated, look for an epileptic." The older criminologists believed it, and some of the more "advanced" ones still thought there was something in it. And while they were still pondering the matter, Clara

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Phillips confessed, and some of the attorneys heard about epilepsy and the Romans. Then they began stalking the experts.

But it was a bad season for them: the alienists were wary. Memories of recent trials still rankled—the recollection of great and uncompensated loss of time, prestige, credit, and reputation. They still recalled the deviate statements of an unassailable press. Besides which, it was known that Attorney Charles Fricke, now Judge Fricke, was to be the cross-examiner—always an uninviting prospect. For, despite prevailing opinion to the contrary, many alienists are human beings. Wherefore, they are opposed to vivisection—upon themselves, at least. They do not contemplate with any degree of pleasure the prospect of submitting themselves to phlebotomy as administered by such master cross-examiners as a Charles Fricke, a Henry Harris, a William Travis Jerome, a Paul Schenck, or a Clarence Darrow. It is bad form, or may prove so.

“But Doctor, I have here a most complete history of hereditary tendency to epilepsy, and of epilepsy itself,” Judd Rush, the (then) attorney for Clara assured me. “A clear case of epileptic insanity can be established by the girl’s own history.” And he really had the documents to sustain his statements.

But I was gun-shy. Documents, or epilepsy, or hammer murders even, did not interest me. I had had enough. But one, or a dozen, refusals are no rebuff to a good attorney. And finally I was cajoled into agreeing that if Rush could persuade Dr. So-and-So to go in on the case, I would come in, too. I found great comfort in the idea, because I happened to know that So-and-So could not be dragged into the witness box on this case. He said so himself. So I sent Rush on his way, both of us feeling happy.

It was transient emotion. The medicine I had given Rush worked all right, temporarily. But a week later there came into my office Attorney Aggeler, then Public Defender and now Superior Court Judge, and with him a newcomer, attorney Bert Harrington. The Hammer Murder Case had been transferred to them, and they were seeking alienists, armed with a still more convincing sheaf of epileptic proofs.

By this time I was all loaded and primed to resist trouble; yet I did not seem to get results. Harrington was an old-time prosecuor from up North, and persuasive. Honest, too. He could offer no remuneration whatever, he assured me, since Public Defenders, unlike District Attorneys, are usually shy on funds. But what of it? Harrington himself was serving absolutely without

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pay. And if he, why not the alienist who believed as I believed? It was my duty!

THE DOCTOR'S DUTY

Now, ordinarily, when an attorney—a lawyer, of all men—begins to spring the “duty” stuff on you, it is time to place your right hand firmly over the fifth rib of your left side, and look fixedly to the East! It is your only hope, especially when they are two to one, as in this case.

But I had my adamant friend, Dr. So-and-So to fall back upon. So I pulled this little joker from the thoroughly cold deck in my hands, and sent the attorneys confidently on their way.

But trust a good lawyer when it comes to taking advantage of absence and innocence! Two hours later Dr. So-and-So called me up just to let me know that, since I was so eager to go on the case as the two lawyer friends of mine had told him, under those circumstances, naturally, as my old and esteemed friend, he could do no less than get in on the case with me!

The fireworks of the Hammer Murderess trial, that is, the merciless war of extermination between law and medicine, proved to be all that could be anticipated. Apparently the doctors, as usual, were completely annihilated. Those

public servants, the press representatives, just as good as admitted it.

Despite which, curiously enough, the jury brought in a verdict that did not reflect this sweeping legal victory when one considers the nature of the atrocity of the crime. It was most puzzling, in the light of the evidence given, or alleged to have been given, as related by the newspapers. Could it have been that some of the jury placed some credence in the statements of those squirming, sweltering experts?

I cannot answer that with certainty. But certainly something mollified the fire-eating spirit of the members of the jury. I suspect it was the truth that they heard from the witness stand, which in some essentials was so very different from what had appeared in print.

As for the expert testimony, I doubt if many of the jury heard very much of it. Not because there was not enough offered, however. But the length and volume was about equally divided. And, anyhow, as one juror once told me, "We don't listen to you fellows much. We count that the time the experts are on the stand is the time for us to rest up our minds so that we can take in something important."

Maybe so. The man appeared to have fair intelligence and to be reasonably honest, as jury-

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men go. But *something* must have influenced the Hammer Murderess jury—either the alienist or the facts in the case that showed in such conspicuous contrast to the press versions—for they brought in a verdict that carried about the lightest sentence consistent with court room decorum.

WHEN YOU SEE IT YOURSELF

Seeing is believing, particularly if we see it in print. Indeed, to most of us, printed matter is almost irresistible. If we stop to think, we know that most of what we read in the harum-scarum press is likely to be unreliable. But, we do not stop to think. We just gulp down one dose after the other.

Probably the court room habitués have a greater opportunity to note the disparity between fact and press reports than any other class of persons. Indeed, it is proverbial that court room “gang” and newspaper “crowd” are not inclined to take each other seriously—and with considerable reason all around. “Good fellows, but unreliable,” as one of them once told me.

The Hickman case, for example, had quite as many interesting points that did not get into print as those that did. None of them was the sort of thing that would affect the ultimate course of justice, but interesting to the average layman.

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For example, it was never stressed if indeed more than merely mentioned, that Hickman was a genius in the matter of handwriting. He had cultivated and developed his gift. His crime partner or apprentice, Welby Hunt, related how young Hickman practiced his penmanship for hours on end, imitating and copying signatures, on blank checks collected from various banks. Successful efforts, too, as the murderer demonstrated with considerable pride later, by deftly writing below the signatures of attorney Walsh, attorney Gilmer, and others, replicas so accurate that the original signers could not distinguish the forgeries from their own.

Another unprinted bit of evidence occurred during the examination of one of the Hickman relatives by a psychologist who was giving an "intelligence test." It is a test for fourteen-year-olds. Here it is: "A man who was walking in the woods near a City stopped suddenly very much frightened, and then ran to the nearest policeman, saying that he had just seen hanging from the limb of a tree—a what?"

"Why, it might have been a squirrel," the relative suggested, naïvely, after a moment's reflection.

Motives seem to be the things most easily fathomed by all of us—even though we know

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that a good share of the time we guess wrong. But we never tire of explaining the motive for every important act that comes under our observation. And courts of law and the press seem to have about the same average degree of accuracy in these matters as the rest of us.

All the world knows just why it was that young Attorney Walsh was willing to sacrifice his time, money, and effort in the defense of a despicable criminal like Hickman. I know, or *did* know along with the others, exactly the thing that they all know. But a little incident occurred during a short recess in my own cross-examination by Walsh, that—well, I will relate the incident, and leave it to the reader to “motivate.”

“Doctor, do you happen to know Dr. Frederick Peterson?” Walsh asked me a moment before I was to return to the witness box so that the attorney might continue his cross-examination. This was an unofficial conversation, of course.

I assured the attorney that I did know Dr. Peterson personally, and very well indeed.

And then, with emotion so obviously different from what he exhibited habitually in the court room, the attorney explained that this Dr. P—— had once cared for a very dear relative of the attorney, one of whom the young man had been very fond.

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There were many points of resemblance between that last illness, it struck me, and the one with which Hickman was alleged to be afflicted. Possibly there was a far deeper emotion than mere gain in reputation that influenced the young man to offer his services in the defense of this vile criminal.

Which illustrates the difficulty in judging human motives. Also the chance for error, in estimating the value of the testimony from the witness stand. I, personally, doubt if any important witness ever did or ever can keep his oath to tell "the truth, the whole truth, and nothing but the truth." Yet the jury is supposed to sift out the facts.

CHAPTER XVIII

ERASING THE ALIENIST

NOW, at last, they have the expert alienist digging. Grave-digging, I mean—his own grave. He has been slow in starting as compared with some other departments of medicine. The surgeons and internists have been at it for half a century, finding out the causes of diseases and how to prevent them, and thus working themselves out of a job. But during this period, the alienist—the physician who deals with “mind” and “opinion,” rather than cold, angular scientific facts that may be demonstrated in the laboratory—this physician had sat idly by, still attempting to prove things by his opinion alone.

However, so long as it was merely his opinion against some other fellow's, with no laboratory or other means of proving or discrediting either one, it was all very nice. Profitable, too, the public believed, at least in such cases as the Thaw, Leopold and Loeb, Harry New, and some others.

There was a certain amount of odium in such cases; in all cases, indeed, if you were on the wrong side. But it was generally believed that the

alienists did not mind this, that they were not looking for scientific emancipation at all.

It happens, however, that under the pachyderm exterior of the hardened alienist, there is found occasionally a more sensitive layer. He had no comeback against the press and public railleries, but he yearned for one. On the quiet he sought one, eagerly, even prayerfully. And presently his prayer was answered, that is, began to be answered on the instalment plan.

First off, it came surreptitiously and pretty well covered. A laboratory man named Wassermann found a way of testing the blood and spinal fluid of a man, and telling him whether or not he had "it," if he did. Not guess work, matter of "opinion," or chance of mental flipperiness, but actual fact.

As a result, the doctor in Steuben Corners, Illinois, could extract some blood from his patient, Deacon Smith, and send it to some unknown laboratory worker in Chicago. This laboratory person had never seen or heard of Deacon Smith—didn't know that the sample of blood labelled "No. 37—Dr. Jerome Jerkins, Steuben Corners, Ill." belonged to the Deacon or any other really concrete person. And didn't care.

He simply turned specimen "No. 37—Dr. J. Jerkins" over to his office girl technician who proceeded to make some comparatively simple

chemical experiments. But in about twenty-four hours that young lady knew more about "No. 37—Dr. J. Jerkins" present state of health, and past life—particularly if the Deacon had happened to have a "past"—than the Deacon or his doctor or anyone else in the world knew or suspected. More than the wisest man in the world could determine ten years before, except as a matter of "opinion."

But what in the world has Deacon Smith's past or present to do with the expert alienist? A very great deal, when you know how. For it is now known that about fifteen or twenty percent of all asylum inhabitants have had "pasts" that can be determined in the laboratory, with absolute certainty and without "expert" aid or opinion. This disease "general paresis," or "softening of the brain," is a form of almost incurable insanity that requires no alienist for diagnosis. You no longer hear witness-stand wrangles over general paresis cases as "matters of opinion"—not these ten years back. The laboratory girl makes some marks on a piece of paper, sends it to His Honor, and that settles it.

If the "paretic" who attempted Roosevelt's life had postponed his effort for about three years, he would have landed in the asylum direct, instead of being relayed *via* the penitentiary.

ERASING THE ALIENIST

THE ROCKY ROAD TO JUSTICE

And so, in fifteen or twenty percent of insanity cases, the expert alienist found himself out of a job—and thanked his good luck for it. There were still the remaining eighty percent to be accounted for. But things were working. And presently it was found that hardened arteries in the brain accounted for five to ten percent of other mental aberrations—the “senile psychoses”—and could be pretty definitely proved without bothering the witness-stand or the lawyers.

In the meanwhile, a whole lot of alienists, even as they babbled their “opinion” stuff from the chair, believed that certain definite chemical and physical symptoms occurred with regularity in most dementia praecox cases—the most important form of insanity, incurable, and embracing something like thirty percent or more of all lunacy cases. But, as yet, there were no absolutely certain means of proving the thing.

The leaven was working hard, however. The jokesters of the press had turned loose their typewriters on “monkey glands” as comic strip material, not suspecting that these same glands, and their relatives and associates in the body, were launched on a campaign that would revolutionize modern medical thought and practice—including alienist testimony.

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But such is the case. And to-day the miracles wrought with insulin, thyroid, adrenalin, parathyrin, and pituitrin are pieces of household knowledge. What isn't known or appreciated so widely, is that these substances are simply branch members of the "monkey gland" family. Which, by the way, is really doing, right along, to-day what the roysterer press joked so loudly about its not doing, only day before yesterday.

But where, again, you may well ask, does dementia praecox come in on all this? A good question, and just now eliciting a pretty definite answer.

Over in Norway, an "alienist" named Gabriel Langfeldt has just completed a series of accurately scientific investigations, and written a volume telling about it, in which he proves pretty conclusively that something like eighty percent of cases of the two most common forms of dementia praecox have "gland" symptoms, and other definite physical symptoms, that can be demonstrated regardless of "opinion."

Some of the alienists on the Hickman case knew this; and had the prisoner himself shown any evidence whatever of being insane, these tests would have been made. I know, because I discussed the matter with District Attorney Keyes and Murray.

Indeed several of these tests were made surreptitiously by some of our prosecution alienists. But as the results were negative (as expected) in those attempted, the matter was not pushed.

However, on a hint dropped in court, one of these tests—the dermographic, or “skin writing” test—was attempted as a spectacular move in the court room. The doctor under cross-examination, Dr. Paul Bowers, scratched a large letter “H” on Hickman’s chest and back. And the “H” remained there as a red letter for several seconds.

“What does that mean?” defense attorney Cantillon asked.

“Nothing—absolutely nothing,” the Doctor told him. But he might have added and explained that if Hickman was really suffering from the form of insanity called *dementia praecox* there might have been a very important significance to the reaction, because the reaction itself would probably have been different. This “different” reaction is seen in a high percentage of real *dementia praecox* cases.

It could have been explained also that in cases in which the dermographic test is positive, many other very definite symptoms are likely to be found. Thus, the pupils of the eyes would probably be large, the blood pressure low, the feet

and hands cold and clammy with blue skin, and the rate of the heart beats off the normal—either abnormally slow, or too rapid and “jerky.” Also, there would be some responses to certain tests that would make excellent newspaper copy of the monkey gland comic strip type. For example, if you pinch the skin of the neck of a normal person, the pupil of the eye dilates. In most dementia praecox cases (and, incidentally, in the case of Hickman) it doesn’t. Or again, if you press the eyeballs of a normal person, no effect is produced upon the number of heart beats per minute. In a vast majority of dementia praecox cases, the heart rate slows down perceptibly. This is known as Aschner’s reflex.

When it was tried upon Hickman there was no change in the pulse rate: the response was that of a normal man. And it would have been, even if he had known what it was all about, since these tests are quite beyond the control of the will. “Opinion” has nothing whatever to do with it.

But these are merely samples of tests that might be made, and are being made every day in the laboratories all over the country, gradually building the foundation of demonstrable facts. Thus, the “Kottman’s test,” the “Fauser-Abderhalden test,” the adrenalin and the pilocarpin

tests, to which dementia praecox cases are characteristically responsive, make excellent medical "copy." While such things as the fact that most dementia praecox cases have more white blood corpuscles of a certain type than normal persons, that their intestinal tracts respond abnormally when sugar is fed them—these and several other perfectly tangible things, are well established.

There is no mystery about these things. The medical world knows them, at least the progressive, unhide-bound members who keep step with the sweep of science do.

They know, also, that the chair of the old-time "opinion" alienist is wobbly on its legs. Yet, although senile and tottery, it will hold its own for several, perhaps many, years to come.

It will do so, partly through the fault of the medical men themselves, but largely, I think, because of the attitude of the lawyers and judges. Let me illustrate by concrete example.

Out in Los Angeles, when a prisoner jail inmate seems sufficiently "queer" to attract the attention of the jail physician, that individual sends the queer acting prisoner over to the "crazy" examination ward at the County Hospital—which will be one of the largest hospitals in the world, when completed. Here, a number of physicians and other persons observe the queer one's behavior,

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make all manner of tests, and finally pronounce upon his mental state. If the man shows sufficient evidence of insanity, one of the doctors as representative of the staff, sends word to the Judge that, in his opinion, the patient should be examined by the regular Lunacy Commission consisting of a judge of the Superior Court, with two advisory alienists.

Since the doctor making this recommendation is an entirely disinterested person and is acting under circumstances in which prejudice or motive can hardly be imagined, one would suppose the Court would place some weight on such an opinion. Surely, from a commonsense viewpoint it would. But, as has been pointed out, "this is law, not common sense." As the following incident illustrates:

Recently a prisoner who, besides being an Albino (itself a very abnormal condition) was so badly twisted mentally that the jail physician sent him over to the hospital for routine mental examination. He was given the usual careful examination by the hospital staff members, and as he showed symptoms strongly suggesting actual insanity, was returned to the Superior Court with the recommendation that he be officially examined by the Lunacy Commission. The case was heard in the Superior Court, presided over by

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the Honorable Carlos Hardy, the judge who figured in the Hickman case preliminaries; also the judge (and the only one, I believe) who has gone officially on record with the statement that he believed the amazing story of the kidnapping of Amy Semple McPherson, and her story of how miraculously, she walked for hours on the surface of the desert without food, water, or soiled raiment.

The Judge's reaction to the doctors' mild comment that the prisoner seemed "a fit subject for examination by the Lunacy Commission" was this little slam: "I seldom agree with Dr. W—— in his analyses," said the jurist. "If he should come into this court and examine us he would have 90 percent of us in Patton."

Well, maybe so. Alienists really are able to "spot" mental obliquities with amazing accuracy. But the real significance of this attitude illustrates the difficulty of changing anything once it gets itself into the routine of legal procedure. The old method of having jurors or judges pass judgment on the most puzzling forms of disease has become established; and once a thing becomes established in law, it is fixed and fossilized forever, it seems. Then, very few of the lawyers wish any change in the present laws; it would take away their fireworks. Again,

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many of the doctors are against it; it would deprive them of an occasional ray of limelight (or, preferably, *yellow* light) and some parsimony.

For, say what we will in defense of our revered profession, the attorney in New York who declared that "doctors would swear to anything," had more than casual grounds for his statement. There's no denying it. The spectacle of the Thaw case in which one group of alienists at the first trial swore to one thing, and at the second (from the viewpoint of the press) took quite another attitude, is the sort of thing that gives one pause. Indeed, it made the original jury do so, to the extent of "absolutely disregarding all expert testimony" in reaching their final decision that the man was insane.

Nevertheless, the wheels of science—another name for systematized truth—are steadily grinding on. Physical facts, demonstrable in the laboratory and clinic as I have outlined are arraying themselves in battle line. And presently some fearless, keen-minded judge, somewhat familiar with this array, will take the inevitable step—one that he has the right to take even now in two states (Massachusetts and Colorado)—and remand to the laboratory for examination the alleged insane man who has hitherto only

recourse to "alienistic opinions"—of varied kind and quality.

He will not be popular, this pioneer magistrate who will thus thwart the eager press, the sensation-cloyed public, and the professional shysters, medical and legal. But when it occurs, I suspect the venerable old lady of the bandaged eyes who stands at the portals, will relax her somewhat sinister mouth, and take a firmer hold on the scales in her left hand, while not entirely releasing her grip on the hilt of the protecting weapon she bears in her right.

APPENDIX

EXPERT TESTIMONY

BY CHARLES W. FRICKE, LL.M., J.D.

Judge of the Superior Court for Los Angeles County, California; President of the Southern California Academy of Criminology; President of the Narcotic Research Association of the Pacific Coast States; Professor of Criminal Law and Procedure at Loyola College

Expert testimony is the means whereby the judge and the jury may have the benefit of the knowledge of men of science and other persons skilled in the arts and trades when the decision of the questions involved in the litigation requires such knowledge. The obvious difficulty of presenting such knowledge has led to the adoption of certain laws, rules and methods of procedure which, while not entirely satisfactory, are difficult to improve upon, as has been demonstrated by the fact that the substitutes suggested are less satisfactory than the present methods. Of the many subdivisions of the topic of expert evidence, the hypothetical question has received more than its share of criticism and discussion.

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STATUTORY PROVISIONS

A subscribing witness to a will, the validity of which is in question, may testify to the sanity of the testator. An intimate acquaintance may testify to the sanity of a person, the reason for the opinion being given (1870-9).

A witness may state his opinion of handwriting where he has a familiarity with the handwriting of the person who is charged with the writing.

A witness may give his opinion "on a question of science, art, or trade when he is skilled therein" (1870-10).

Some illustrations of the above are that persons who are familiar with the cryptic signs used by bookmakers may testify to their significance; persons familiar with a game of cards may testify that a game, the manner of playing being described in the question, was such a game; entrance and exit wounds either on a body or in the clothing may be proved by witnesses familiar with such injuries; a witness may give an opinion on a matter of knowledge gained by experience which is not common to others, which general statement is the broad basis to the exception against a witness giving his conclusions.

Even actual experience is not necessary. Thus a physician may testify as an expert and give his

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opinion, basing the same upon his studies, even though he has had no actual experience in cases of the kind under consideration.

Whenever it appears that expert evidence will be required the court may appoint experts who shall make an investigation and may be called to testify and may fix their compensation. Parties may call their own experts, but such experts "shall be entitled to the ordinary witness fees only" (1871).

THE HYPOTHETICAL FUNCTION

No discussion of expert testimony before a body of medical men would be complete without a few words about the subject of hypothetical questions, a subject much misunderstood by both the doctors who are witnesses and the lawyers who question them. The lawyer suffers from hypohthetickarrhea and in the meanwhile the doctor is suffering from an internal indignation and a hope that he is looking intelligent.

Dr. William A. White in his "Insanity and the Criminal Law" devotes a special chapter to this subject, a reading of which should somewhat salve the hearts of the medical profession. Among other things Dr. White says:

"In the first place, the patent criticism against the hypothetical question is that it has absolutely

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no reason for its existence, except a reason founded upon what seems to be rather unnecessary effort to conform to a theory, namely, the theory that it is the jury's function and not the expert's to decide whether the person whose sanity is in question is or is not of unsound mind."

Again the doctor says that "It is a psychological impossibility for the expert to take all of the facts that are in evidence and which are included in the hypothetical question and which relate in their evidential value to the defendant and to no one else, and to consider them by themselves apart from the knowledge that he has that they do so relate to the defendant."

He also mentions, "Then again the alleged facts that are incorporated in the question may not be facts at all." To remedy this he suggests that the expert hear all the testimony, determine the credibility of the respective witnesses and the weight to be given their respective testimony and accept his own conclusion as to the facts obtainable from the witnesses, add it to his pre-acquired knowledge and then give his opinion. This would be easier, no doubt, for the expert, but we are hardly prepared as yet to allow a doctor to determine questions of fact. As a determiner of questions of fact, credibility of witnesses and weight of evidence, he is no better

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qualified than any other equally intelligent and informed layman.

The doctor admits that the expert insubordinately does not abide by the law and the terms of the question, for he says of the expert, "He formally answers the hypothetical question, but his answer has little to do with the hypothetical monstrosity created by the method of legal procedure; his answer refers to the defendant, it is his opinion of the defendant from all he has been able to learn of him. . . ."

The last quotation indicates the reason for the hypothetical question. It is intended as a means of placing before the expert a set of facts to which he is to apply his medical or other special knowledge, and then state his conclusion. It is intended to prevent the expert from usurping the functions of the jury whose exclusive province it is to determine all questions of fact.

An expert may as well testify to an opinion formed as the result of a personal examination by him, as one based upon a hypothetical question. Such personal examination may include objective and subjective symptoms.

The difficulty arises from facts testified to by witnesses, generally as to conduct and appearance of the person in question, which are conceived by counsel as tending to prove or disprove the prop-

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osition with reference to which the expert is called. Much as the expert would like to decide for himself which of these witnesses is telling the truth, and the right to be given to their testimony, this is impossible, for the jury (or the court in cases tried without a jury) may well arrive at a different conclusion and it must not be forgotten that they must decide the ultimate fact. To take away this function of the jury is to deprive the accused in a criminal case of his constitutional right of trial by jury.

The trouble, however, is not so much one of the use as the misuse, either by intention, but usually due to lack of skill, of the trial lawyer unrestrained by the trial judge, of the hypothetical question. If a statement of symptoms and case history is made to a doctor it either is, or is not, sufficiently complete to permit him to form or express an opinion or else it is inherently contradictory to a degree that makes it unanswerable. If not answerable, the doctor should so state, giving his reasons. If answerable, his opinion, qualified if necessary, can be expressed. This can be done in the court room as well as in the office or lecture room.

In his desire to get everything into his hypothetical question which will tend to produce an opinion from the expert that will be favorable to

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his side, the trial lawyer incorporates all of the testimony which he believes will result in such an opinion. Much of this material is of no real value to the expert as a determiner of his opinion, some of it may be inconsistent with other portions, and some may not be sustained by the testimony in the case. These conditions are not uncommon. The remedy is by striking out the matter which does not belong in the question. The court can only strike out the portions not sustained by the evidence. The reformation of the balance of the question is a matter which the lawyer should have attended to before he calls for an answer. Since he knows the facts which he can prove, there seems to be no reason why the question could not be reduced to writing and submitted to his experts before they are put on the stand and the excess baggage eliminated by them.

As a matter of practice it is my personal opinion that the use of the hypothetical question accomplishes little for the attorney who uses it. Where this form of question must be employed, where it is necessary that the expert take facts into consideration as to which he has no knowledge and which have entered the case through the testimony of witnesses, the greatest care and skill should be employed to make it practical,

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concise, and accurate. Juries are antagonistic to anything so involved that they cannot easily understand it.

SOME SUGGESTIONS FOR THE EXPERT

The expert's greatest weakness lies in the fact that he is called as an expert and is most reluctant to admit that he doesn't know all that is knowable about the subject to which he is called to testify, and all other allied subjects. All too often, when not certain of the answer, and rather than admit that he does not know or that he is not certain, the expert witness takes a chance and gives an answer, believing, or at least trusting, that he will get away with it. Sometimes he answers, not as he knows the fact to be, but as he believes it to be. The expert should not consent to be called to testify on a subject unless he really knows his subject. If questioned on a matter outside that subject he should only make an answer that he feels sure of and if he isn't sure, the best policy is to say so.

Don't match wits with the cross-examiner. Remember that you are playing his game. He is controlling the examination. The chances are that he is more at home in the court room than you are and he would be a poor advocate indeed if he couldn't win in the exchange, and since an

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exchange of wits usually results in a laugh at the loser, the expert is likely to find the laugh on himself, and that laugh may destroy the serious consideration which his testimony would otherwise receive.

If a question is not intelligible, and questions asked by lawyers of experts are frequently so, don't try to answer, but say you don't understand it and, if you can, give the reason.

Stop testifying after you have answered the question. To do otherwise may give the impression that you are anxious to testify for your side and are biased. Furthermore, the matter volunteered may open up a dangerous subject for cross-examination. Also, if the matter volunteered is not responsive to the question, the lawyer examined has the right to have that part of the answer stricken out. As it is the duty of the court to instruct the jury that they must not consider any testimony which has been stricken out, the effect upon the jury is obvious.

Don't evade or try to dodge the question. If you try it the only person you will fool is yourself. Answer the question even if it hurts.

Be frank. The weight which the jury will give to your testimony depends largely upon your manner upon the stand. Remember that the expert is to give to the jury his knowledge and

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opinion. Give the answer which you know to be the correct one and give it frankly and willingly, even if it tends to favor the side of the party against whom you have been called.

In the court room, while the trial is going on, don't pop out of your seat and rush over to tell the counsel for your side what to do. In the first place it attracts attention from the matter before the court to the evident fact that you are partisan and very much interested. Again, it interrupts the train of thought of the attorney and the chances are that, even if he tries to get what you have to say, he won't fully grasp it.

Make sure of your facts. Ascertain whether what you are inclined to accept as facts are disputed or admitted.

Distinguish between fact and inference.

When testifying, use language so simple that every juror can understand you. If you must use a technical term, explain it immediately, but don't use terms not generally understood unless it is absolutely necessary. The jurors are non-technical people and as such, inclined to resent anything which looks like putting on airs or assuming a superiority, especially when coupled with what they take as a claim of infallibility. Again, the use of technical terms will lead to a request for definitions. Definitions given on the

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spur of the moment are difficult to give and quite likely to be inaccurate and subject to criticism. Also, be sure you don't use a technical term you can't spell. You may be asked to spell it.

When making an examination or otherwise acquiring knowledge of the cases, take notes; take detailed notes; take more notes than you will ever need. If possible, have a stenographer present to take notes for you. You know it's easier to have some one else work than to work yourself.

Avoid illustrations as much as possible. They may be double-edged swords. They may furnish the means of leading you away from the main topic.

Stick to the main topic, the subject with reference to which you were called. The expert should, as nearly as possible, know all about the main topic. It is impossible for him to know all or even a great part of every other topic of his science or profession. One of the commonest devices for discrediting the expert is for the cross-examiner to lead him away from the main topic to other fields and cross-examine on a subject upon which he is not prepared. Sometimes the expert strays of his own accord or is led to do so by counsel calling him. Have it definitely understood as to what subject or subjects you are being

called to testify, and have this understanding with counsel before the trial.

Remember that, so far as you are concerned, the trial is an examination of yourself as to your knowledge. Prepare for that examination. If possible read what has last and most recently been written by authorities on the subject in question, but don't overlook discussion of that subject in your professional Journals.

Ascertain who are to be the other experts who are expected to be called for the same side as that for which you are to be called. Obviously experts on the same side of the case are expected, by the jury at least, to agree. The position of the expert called on the same side with a man from whom he knows he will differ, or worse still, a man whose knowledge is superficial and opinion unreliable, is obvious.

Make it a condition of your employment that you be given an ample opportunity to prepare for the trial. See that you are given ample time to examine the patient and as frequent opportunities to examine him as you yourself consider necessary. If you are ever called without the preparation you deem necessary, qualify your answers so that the court and jury may understand why you did not make findings which other experts in the same case may have made.

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When on the witness stand don't chew gum, put your hand before your mouth or hold it up to your face; don't twiddle your eyeglasses, play with your watch chain, or with the assortment of pencils and pens in your pocket. I have seen medical experts do every one of these things I have mentioned. It is unnecessary to comment upon the effect on the jury.

Don't pose on the witness stand or try to act like some other expert whose manner on the stand you have considered worthy of imitation. You may fool yourself into the idea that you are making a success of it, but courts and juries may think otherwise. Be natural.

Much more might be said on this interesting and important subject, but every presentation must have some time limit. May I, in closing, say that the expert must ever keep in mind that he is not an enlisted man forming a part of the army of offense or defense for the side which calls him. He is called as a man having special knowledge to relate what facts he has learned as to the matter involving his special knowledge and to give his own personal and unbiased opinion on that matter. He must carefully guard against his being influenced, consciously or unconsciously, by the fact that a particular contestant has called him. He must satisfy himself as to

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the honesty and sincerity of the person who calls him and of the person in whose behalf he is called. He should be absolutely indifferent as to the ultimate outcome of the trial. His testimony when concluded should be a credit to his science and profession.

Sans Tache



Sans Tache

IN THE "elder days of art" each artist or craftsman enjoyed the privilege of independent creation. He carried through a process of manufacture from beginning to end. The scribe of the days before the printing press was such a craftsman. So was the printer in the days before the machine process. He stood or fell, as a craftsman, by the merit or demerit of his finished product.

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